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SLAVE PROPERTY IN THE TERRITORIES.[1]

It is neither within our wish nor the purposes of this journal, to engage in the discussion of any matters which are agitating the political mind. But, on the other hand, we see no reason why we should be deterred from examining any question of purely constitutional law, by legal and constitutional tests, because partisan bodies, in a struggle for political ascendency, see fit to assume its decision to be in one direction or another.

It is a singular fact, that one of the most exciting topics which is engaging public attention in the present presidential canvass, grows out of a construction of the Federal Constitution. Each party affects to go to that as its guide, and to build upon that its theory of political action. And that the whole country should be agitated to an extent that even threatens the dissolution of the government, upon the point whether the fundamental law says and means one thing or another, when the framers of that law devised and planned it, with so much care and solicitude, to be a plain, intelligible test and standard, by which all other laws were to be examined and tried, is certainly most remarkable, if it is not most alarming. If, indeed, our constitution is so vague in its terms, or so inconsistent in its parts, that men of sound judgment, adequate knowledge in matters of history, and honest purposes, are unable to understand the meaning and effect which the framers of the instrument and

[1] We admit this article, contributed by a distinguished jurist who is not a politician, as a fair discussion of a point of constitutional law, but without adopting all the opinions of the author or assenting to all his conclusions.—ED. L. R.

the people who voted to adopt it, intended it should bear, it is but a sad commentary upon the political sagacity of the wisest and most patriotic of men.

The subject to which we allude is, what are the constitutional rights of the holders of slaves who reside in the States, in respect to such slaves within the territories of the United States? As we understand the questions which have been raised, the view entertained by one class is that slaves are property, that the territories are a common heritage of all the States alike, and that the owners of any of this class of property have the same right to carry and hold their slaves, as they would their horses or neat cattle, in any of these territories, and that it is not competent for Congress to pass any law prohibiting them from so doing. Another view maintained is, that, while Congress may not pass a law prohibiting the possession of slave property in the territories, the people themselves who migrate thither, may, as soon as they are competent to act as a body politic at all, determine whether slaves shall be held in the territory which they occupy; that it is a question which the settlers alone are competent to determine, and that they may do so, without waiting to become organized into a State.

The other view is understood to be this, that Congress has, by the very necessity of the case, as well as by the language of the Constitution, full powers to make all necessary laws for the regulation of the territories, until they become States, and that among these powers is that of determining whether slaves shall be held there or not,—connecting with this dogma, the duty, as well as the right of Congress to prohibit slavery in the territories.

We have quoted from the language of no platform in making this statement, and have borrowed what we understood to be, in general terms, the several positions assumed by these parties, without entering into details.

Each of these theories, we understand, has able and earnest supporters, who base their arguments upon what is alleged, or assumed, to be the meaning of the Constitution.

Now, without troubling ourselves with either of these as political dogmas, we have been led to look at the Constitution itself, in what seemed to be a legal point of view, to ascertain, if we can, what the relation of slaveholders in the States is to the territories, in respect to their slaves, as a pure matter of constitutional law.

In the first place, the Constitution was not a thing granted or imposed by a superior to or upon an inferior. Every one of the original thirteen colonies, then States, that had tried the experiment of the confederation, "in order," as they say, "to form a more perfect union," took part, through their delegates, in framing that instrument, (*vide per Wayne, J.*, 16 Peters, 638.) Every part, clause, and provision of it were, afterwards, elaborately discussed in public essays and debates, before the people of the several States acted upon its adoption.

Whatever were its provisions, they must have been examined in the light of the past and present condition of the late colonies, at that time States, and could not have been hastily adopted or approved. The States, as was the case with Massachusetts, if they had objections to the instrument in any of its parts, suggested the desired remedies and corrections by the amendments they proposed.

The limits of territory, constituting these several States, were either then known and defined, or were soon after satisfactorily determined, so that there could be no misapprehension as to the extent over which each State might exercise its own sovereignty and jurisdiction. Within that specific territory, Congress, though representing the sovereign power of the whole, had no jurisdiction or authority whatever, beyond certain limits, and defined subjects, which were necessary to give a simple, effective, and homogeneous action to the General Government, over the federal body politic. (*Vide per McLean, J.*, 16 Pet. 663.) Among these the subject of slavery was not embraced, as one over which the General Government, by any power expressly delegated, had cognizance.

On the other hand, beyond the line of its own jurisdiction, no State had a right to exert or extend its sovereignty.

In some of these States, domestic slavery then existed. In others it had been abolished, though it had once existed in all. It was obvious that, with this limited power on the part of Congress, if each State was to be, in all things, sovereign and independent, the consequence would be, that, if any one escaped from his own State into another, there would be no mode of reaching him so as to reclaim him, except as an act of comity. This was the uniform condition of things between independent nations where provision had

not been made by treaty for the extradition of persons in certain prescribed cases.

A difficulty and an emergency like this had existed between the New England colonies, at their first planting, which had been obviated by a clause in the articles of confederation into which they had entered in 1643. By those, in addition to a provision for the surrender of fugitives from justice, "it is also agreed that, if any servant run away from his master, into any of the confederate jurisdictions, that in such case (upon certificate, &c.) the said servant shall be either delivered to his master, or any other that pursues, and bring such certificate and proof." While the articles of confederation of the States, of 1778, contained a clause for the extradition of fugitives from justice, there was no provision made for delivering up those who were bound to service and had escaped from one State into another. It was further provided by that confederation that "the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States."

It is hardly necessary to repeat in this connection, that slavery is, from the nature of things, a local institution, the creature of local legislation, or of the exercise of the supreme power in a State, and that a law or edict of this kind can have no binding obligation, as such, beyond the limits of that particular State. The consequence is, that if a person who is, by such law or edict, declared a slave in one State, goes into another independent State, he ceases to be such, and cannot again be made a slave there, except by the act of the sovereign power of the State in which he is found. (16 Peters, 611, *Prigg's case.*)

Accordingly, if a citizen of Maryland owning slaves had removed into Pennsylvania to reside, carrying his slaves with him, it is too obvious for argument that they would have, at once, been free. All idea of *property* in them would have been lost. By the same principle, it would have made no difference with the personal *status* of the slave, outside of the limits of the State by whose laws he had been held to service, whether he was carried into a territory which had, or one which had not, an organized government, or whether it had been constituted into a free State. He would have lost his original *status* of a slave, and

acquired that in which the law of his new residence had placed him, or, if it was without a municipal law, he would be free by the law of nature.

These principles, by the way, are a great deal older than our Constitution, and were familiar to the men who framed it.

They saw, too, the consequences to which it must lead. In fact, the experience of the country under the confederation, in respect to slaves, must have suggested the consequences. And they undertook to obviate it, not only in respect to fugitives from justice, but as to all "persons held to service," whether indented apprentices or slaves, provided they were held in any of the States "under the laws thereof," escaping into another State. For cases like these, they provided a plain, intelligible, but stringent rule, by extending, as it were, the sovereignty of one State over the other so far that whomever the one declared a slave, should, in certain contingencies, be regarded still a slave, though within the territory of the other. (*Vide per Wayne, J.*, 16 Peters, 645.)

But while the convention were thus endeavoring to adjust conflicting questions of property, and sovereignty between individuals and States, they aimed, also, as we are told in the 84th number of *The Federalist*, to make the Constitution a "Bill of Rights of the Union."

And, accordingly, while they extended the privileges of citizenship over the Union, and provided for the surrender of fugitives from justice, they were careful to *define* under what circumstances any other *person* might be delivered out of the protection of a sovereign State, upon the requisition of some person claiming such a surrender.

After providing in Art. 4, § 2, that *citizens* in each State shall have privileges and immunities as such, in the several States; and, in the next, defining under what circumstances a person should be surrendered as a fugitive from justice, —the article declares that "No *person* held to service or labor in one State, under the laws thereof, *escaping into another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, *but shall be delivered up*, on claim of the party to whom such service or labor may be due."

This is the entire provision, and we have italicized some of the words as bearing upon the question, upon what

authority it is contended that the Constitution recognizes slaves as *property*, except so far as to provide for their being delivered up to one claiming them.

In the first place, the Constitution nowhere declares that any man is a slave, or shall be such; nor does it provide for making any man, by any act of legislation, a free man or a slave. It nowhere recognizes property in man as a thing of barter, sale, or confiscation.

If it is said that everybody understands that this clause was aimed to affect the surrender of slaves to their masters, although the term "slave" is not made use of, it is equally true that when they came to provide for that, they chose to make it broad enough in terms, to embrace all cases of persons held to service, as well the indented apprentice as the slave bought in the market. In treating of them, moreover, they regarded them, so far as the action of the federal government or the Constitution was concerned, *persons* and *persons only*. Their absolute personalty ceased only *when* they had been delivered up to the one to whom their labor was due, and only *where* such labor could by law be enforced.

Was it ever contended that the Constitution recognizes any right by which, if the slave of a Virginian master were to escape into Pennsylvania or Ohio, and was there employed and worked by a citizen of the latter State, the master could maintain *trover* for his slave, or *assumpsit* for his services upon an implied promise to pay the master his wages? (*Vide per Thompson, J., Priggs case*, 16 Peters, 634.)

The remedy of the master, in such case, is a special and peculiar one, and is the seizing of the person whom he claims as a slave, not the recovering, by law, of his value, as a thing of property, nor even of his person, as property, by any form of process known to the common law, like *replevin*. Nor, if the place of seizure is a free State, had the master any right to work or sell his slave in that State, as having a property or ownership in him. The most he could do was to carry him into a State where he was a slave by force of the municipal law there. It is only when the slave shall have been taken out of the free State, into the State where, though wearing the image of a person, he is, by statute, a chattel, a thing of which property is pred-

icated, that the rights of property could be exercised over him.

But who are the *persons* who can be thus delivered up, as being within the exception to the general protection of State sovereignty, created by this clause of the Constitution? Not only must they have been held to service in a State, but they must have *escaped* from that State into *another*. And even then they are not outlaws, liable to be seized or set at work or carried away at the pleasure of any man. It is only "the party to whom such service" is "due," who can lawfully seize or cause them to be seized and delivered up. If he does not interfere, these fugitives, if in a free State, may live quietly, as *persons*, all the rest of their days, and nobody have a right to molest them. (*Vide per McLean, J.* 16 Peters, 668, 669.) They may not be citizens, but they, certainly, are not, for the time being, while thus residing in a free State, chattels or things, of which property may be predicated.

If this view is correct—and we submit, it is the fair, legitimate reading of the letter of the Constitution—how does this question of the existence of slavery in the territories arise? Where is there a word which gives to Congress the power or the right to institute slavery in any one of these territories? The question is not whether they can or shall make laws, applicable to the territories, to facilitate the surrender of *fugitive* slaves to masters in the States, but whether they can convert, for the first time, a territory, by an act of legislation, into a body politic, and govern it by a slave code, and authorize the holders of slaves from other States to bring and hold them there, by a law thus made by Congress, for that particular territory? If this cannot be done, can Congress authorize South Carolina or Mississippi, or any Slave state, to extend the State sovereignty of these States, with their several local laws and institutions, over the new territories belonging to the federal republic in its sovereign capacity?

We confess we are at a loss to see where Congress gets the power from the Constitution, to act at all upon the subject of slavery in the territories. We make no inferences from the supposed fact that all the then territory of the United States had been provided for, by existing laws and ordinances, and that therefore the convention probably did not foresee or intend to provide for the acquisition of new

territories or for the existence of slavery therein. In construing an instrument like the Constitution, we ought indeed to have a proper regard to the circumstances surrounding its adoption, if its terms are equivocal, or apparently inconsistent. But where its language is plain, its provisions harmonious and capable of being carried into full effect, there is no room for construction. The instrument, itself, forbids extending it beyond what is necessary to carry its several provisions into effect. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

But it may be said, that unless Congress may pass laws upon the subject of slavery, in the territories, slaves may be carried and held there, and be without relief or remedy. If we concede to the utmost that Congress may "make all *needful* rules and regulations respecting the *territory* belonging to the United States," they need not legislate either for slaves or against them, as such. It is enough to legislate for *men*, for *persons* living and dwelling in such territory, if, in fact, they are voluntarily brought there by their former masters. If bringing them there makes them free, they are entitled to the same rights that a free black man from Massachusetts or New Hampshire would have, as a resident within the territory; and a law that would answer for the one, would answer equally well for the other.

On the other hand, it may be said that this doctrine excludes every slaveholder from the territories, because if he cannot carry his slaves there and hold them, the territory will eventually grow into a free State. If such is the legitimate effect of carrying out the Constitution, according to its fair meaning and effect, it may furnish an argument, in the minds of some persons, in favor of changing the Constitution. But it can be of no weight in determining what the Constitution, in its terms, is.

Nor do we see any relief in any legislation by an organized territory, upon the subject. The people of a territory derive their legislative power and governmental functions from Congress, representing a federal sovereignty for certain purposes, over the several territories. But the power of Congress over slavery must be the same within any given territory, whether it has ten or ten thousand in-

habitants. And when it delegates its powers to these inhabitants by a territorial organization, it can delegate no more than it has to part with. It could not, for instance, authorize a territorial government to establish a class of nobility, or install a king with a hereditary title within its boundaries.

We intend to confine this line of argument to what is written and settled, without indulging in speculations as to how the Constitution ought to have been framed, or what this or that member of the convention probably intended. They made a written constitution, open for all men to read and govern themselves by, and for legislatures and States to conform to. They intended it to be a fundamental law which should be changed only by the forms and mode prescribed in the instrument itself. It was the action of the people of independent States, (*vide per Wayne*, 16 *Pet.* 638,) and it contemplated the admission of still other States, which, when admitted, would be as sovereign as themselves within their limits, and as fully empowered to adopt or reject slavery, as the original members of the federal body had themselves been.

And here, as it seems to us, the Constitution leaves the matter. It is when it shall have become a State, and then only, that any part of the territory of the United States can be made to hold a slave, unless he is one who has escaped from a State where he was held to service, and is there arrested and delivered up as such.

Of the political bearings of this examination we take no account. The true meaning of the Constitution is not to be determined by its effect upon the prospects of any one party or another. We have had quite enough of politico-constitutional construction already, — far too much for the peace and stability of our government. As the Constitution was the basis upon which the government itself was built up, it was designed to be stable and permanent, and not to be bent and shaped every four years, to conform to the shifting issues upon which successive presidential elections were to depend.

Nor ought we to be affected in the judgment to which this examination leads, by the singularly reckless declaration of an officer high in authority, to the effect that Kansas was as much a slave territory as South Carolina. It is no more within the province of a president to declare a

person in a territory a slave, than it is for him to declare one, held in service in a slave State, free.

Nor can it aid in this discussion, to inquire whether the result of our examination operates to equalize the rights and powers of the several States as to the public territory, or not. The constitution, as made, was the fruit of compromises and concessions, and, as such, was satisfactory to the people who adopted it. Whatever territory has since been acquired, has been added to the national domain, with a full knowledge on the part of the high contracting parties that the Constitution was just as it now reads. And, in voting for or against the acquisition of this territory, it must have been a question of balancing interest which the representatives in Congress settled for their respective States. And if the meaning and effect of the Constitution was, that the question of having slavery in this territory must be suspended until it should have become a State, it is unfair and unjust, as well as unconstitutional, to insist upon anticipating and deciding the question while it is yet a territory. Individuals could have had no property in the sovereignty over those territories to be regarded in exercising it, and the States owned no slaves with which to occupy them.

Nor, as it seems to us, is the argument hereby intended to be maintained, affected by the historical fact that when the territory, afterwards Tennessee, was ceded to the United States, Congress was expressly prohibited to emancipate the slaves there; and that a similar provision was adopted in reference to Mississippi, when ceded to the general government. It will be remembered that the region constituting these territories had been claimed by the States of North Carolina and Georgia, at the time of the making of the Constitution; that it was then contemplated that it should be ceded to the United States; that this was recognized, in effect, in the second section of the fourth article of that instrument; and that when the territory was ceded by those States to the United States, it was done upon the express limitation that slavery should not be disturbed. To this, Congress assented, and became a trustee of the territory, by virtue of this constitutional arrangement, and not by any inherent power to acquire new territory and then to decide whether it should be free or slave in its character and institutions. Nor do we conceive that there is anything

affecting the argument, in the action of Congress in respect to the territories west of the Mississippi, and northwest of the Ohio, including Iowa and Oregon. In a part of these, it is true, slavery was permitted, and in others prohibited. But whatever may have been the form in which this was done, the effect was what, according to the view above maintained, the Constitution intended Congress should do. In some of these slavery had already been established, and slaves were then actually held under and by virtue of the laws of a sovereign State, creating and regulating slavery within the territory then to be organized. In respect to these, Congress, virtually, left the institution as it found it, by a declaratory act to that effect. In the others of these territories, slavery did not exist. In a part of them it had been excluded by the ordinance of 1787. And in respect to both these, Congress did as it did towards those having slaves: it declined to authorize slavery to be introduced there by what was, in effect, a declaratory act, though in terms a positive enactment.

The "rules and regulations," moreover, which Congress was authorized to make, "respecting the territory," &c. were obviously such as were suited to territories owned by, or under the guardianship of, a superior power, as distinguished from the action of an inherent sovereignty, which is something other than, and distinct from, our idea of ownership, in the nature of property.

This function of sovereignty remained to be exercised when these territories, having become sufficiently populous to sustain and manage their governmental concerns, had been admitted as sovereign States into the national family.

This very matter of adjusting the conflicting interests growing out of the existence of slavery in the Union, had been one of the chief difficulties which the convention had had to encounter. It was compromised, at last, by, among other things, each State giving up so much of its sovereignty as to suffer the citizens of other States to come within its territory, and seize persons residing there, if they had been held to service in and had escaped from another State. In the mean time, the federal sovereignty over this subject, within the States, was limited to carrying out this right of extradition. And yet, according to the theory that Congress had unlimited power of making any rules and regulations for the territories it might think fit, this

same convention and the people were willing that Congress should legislate into the territories the germs of future independent States which might, as they have done, in time outnumber the original thirteen, and perpetuate therein this very institution which had been a source of so much discord and jealousy among the very States which were thereby struggling and making mutual sacrifices to obviate the mischiefs it occasioned. Would they not, in all human probability, have chosen to leave it in the new States as they had left it in the old ones, to be regulated by them, each for itself, within its own limits?

And when this instrument, the result of their deliberations, is carefully examined in the light of the language they employed, and of the circumstances under which its parts were adjusted, does it not fully sustain this construction? With such an interpretation, at once plain, simple, intelligible, and suited to any extent of growth and expansion of the republic, it became, as it was intended to be, an instrument of peace, harmony, and perpetuity between the States, and of strength, efficiency, unlimited growth and united sovereignty to the nation, when taking its place among the sovereign nations of the earth.

Supreme Judicial Court of Massachusetts. Middlesex County.

COMMONWEALTH *v.* IRA TEMPLE.

The legislature, exercising the sovereign power of the State, either by general law or special enactment, have control of all public easements and accommodations for the general benefit.

The right of every one to use the highway is equal, but each is bound to a reasonable exercise of his absolute right.

Where the driver of a wagon made use of the track of a horse-railroad for the wheels of his wagon, and upon the approach of the car behind him, refused to move off the track when requested by the conductor of the car, although he had room and opportunity so to do:

Held, that he was liable to indictment therefor.

Held also, that if the driver wilfully intended to follow his own convenience, in violation of the equal rights of others, it would be sufficient proof of a malicious motive on his part.

This was an indictment founded on the fifth section of the three hundred and second chapter of the acts of 1856, entitled "an act to incorporate the Malden and Melrose Railroad Company," which provided as follows:

"If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or may be imprisoned in the common jail for a period not exceeding three months."

At the trial in the Court of Common Pleas, it appeared from the evidence on the part of the Commonwealth that the defendant was driving his heavily loaded wagon from Charlestown to Boston in a public street, with one wheel in the track of the Middlesex Railroad, when one of the cars of the Malden and Melrose Railroad came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the horse-cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up the conductor asked the defendant if he would please to remove his team from the track. The defendant did not, but continued upon it at the same rate of speed several hundred feet, and then turned off. It also appeared from the same testimony, that it was usual for those in charge of vehicles, like that of defendant, to drive them with one wheel in the track, and that they could be drawn much more easily in that place than in any other part of the street. There was no evidence that the defendant got upon the track in the first instance with the intention of obstructing the cars, or that he changed his rate of speed on the approach of the cars, or that he used the street, or did any act in any other than the usual manner. There was no other evidence than this bearing upon the question of malice. As bearing upon the question of intention, the defendant offered to show that it is not the custom for those in charge of vehicles to turn out when a car comes up behind them, until it suits their convenience. The evidence was objected to and ruled out.

The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street the most convenient to him in the ordinary way, knowing that the car would be obstructed by such use.

The defendant also prayed for the following instructions:

1. If the jury find that the defendant was using the high-

way in the ordinary way, they must find for the defendant, without reference to the motive of his act.

2. In the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if it was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute.

3. There is not sufficient evidence to warrant the jury to find a verdict of guilty.

4. The right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they had previously done.

5. If the jury find that the defendant went upon the track in the ordinary use of the street, without intending to obstruct the car, and continued on the track after the car came up behind him for his own convenience, and because that was the best part of the street to drive on, the defendant is not guilty.

6. In order to establish the crime of obstructing the cars, some act must be shown besides the use of the street in the ordinary way.

7. The act incorporating the railway company created no new crime; it merely attached a new penalty.

8. In the absence of regulations as to the rate of speed, and the mode of use of the track, they have no right to any given rate of speed.

The presiding Judge (BISHOP, J.) declined to give any of the instructions, as prayed for, but did instruct the jury that although the public might drive their vehicles over the tracks of the railroad when the cars were not approaching, the corporation had a prior right to the track; and if the jury should find that the defendant was on the track and hindered the progress of the car, and was requested to remove from it, and could reasonably have removed, he was bound so to do; and his remaining there, knowing that the car would be thereby obstructed, intending thereby to obstruct it, in the use of their track, was a wilful and malicious obstructing within the meaning of the statute, and that it was not material whether the defendant stopped his vehicle, or whether it continued to move on the track at the ordinary rate of such vehicles; that no other proof of malice was necessary than that the defendant knowingly and inten-

tionally obstructed the car, although he may have made only the ordinary use of the street.

To all of these rulings and instructions, and refusals to instruct, the defendant alleged exceptions, and took the case up to the Supreme Judicial Court, where it was argued last October by *P. W. Chandler* and *George O. Shattuck*, for the defendant, and by *Attorney-General Phillips* for the Commonwealth. The decision of the court was given by

SHAW, C. J. — Since horse-railroads are becoming frequent in and about Boston, and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them, should be distinctly known and understood, in order to accomplish all the benefits, and, as far as practicable, avoid the inconveniencies arising from their use. This is important to proprietors and grantees of the franchise, who expend their capital in providing a public accommodation, on the faith of enjoying with reasonable certainty the compensation in tolls and fares which the law assures to them; to all mayors, aldermen, selectmen, commissioners or surveyors especially appointed by law for the care and superintendence of streets and highways; to all persons for whose accommodation in the carriage of their persons and property these ways are specially designed; and to all persons having occasion to use the ways through or across which these horse-railroad cars may have occasion to pass. These railroads being of recent origin, few cases have arisen to require judicial consideration, and no series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise.

But it is the great merit of the common law, that it is founded upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many, and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State, either by general law or special enactment. It may be done by a charter, or special act of incorporation, in case of a bridge over broad navigable waters; or, where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws.

Again, when the entire public, each according to his own exigencies, has the right to the use of the highway, in the absence of any special regulation by law, the right of each is equal; but as two or more cannot occupy the same place at the same time with their persons, their horses, carriages and teams, or other things necessary to their use, each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others; and not to incumber it over a larger space, or for a longer time, to the damage of any other, than is reasonably necessary to the beneficial enjoyment of his own right. If an adjacent proprietor has occasion to stop at his own gate with a carriage or team, if he has occasion to deliver wood, coal, or other necessaries; or, if he is a trader, to deliver or receive merchandise, he must place his team or carriage, for the time being, in such manner as to obstruct the way for the use of others as little as is reasonably practicable, and remove the obstruction within reasonable time, to be determined by all the circumstances of the case.

So in the actual case of the highway. Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their rights, and regulate their speed and movements in such a manner as not to violate the rights of such passengers. So in regard to drivers of fast and slow carriages, each must respect the rights of the other. Take a single illustra-

tion: if a heavily loaded ox-team be passing along a street wide enough for only one carriage, say fourteen feet, and other fast carriages follow, these last must, for the time being, be restrained to their speed, because this necessity results from these circumstances,—the narrowness of the way, and the ordinary slowness of the ox-team ahead. If parties thus travelling in the same direction should come to a portion of the way wide enough for carriages to pass each other, say twenty feet wide, it is obvious that if the driver of the heavy team would turn to either side, it would give the fast team room to pass, whereas, if he should keep the middle, the five or six feet on either side would not permit any carriage to pass. Now, supposing no impediment should intervene, and no circumstance should render it dangerous for the driver of the slow team to bear off, in our opinion it would be his duty to do so, although it might suit his convenience better to keep in the middle; and his refusal thus to bear off would be an abuse of his own equal and common right, for which, if injurious to another, an action would lie; and, if it was a public highway, the party would subject himself to a public prosecution.

In some few cases, the regulation of the use of the highway is important enough to require a rule of positive law, requiring each traveller, when meeting, to turn to the right of the centre;—in some States, to the left. But the circumstances, under which travellers may be placed in relation to each other are so various, that it would be impracticable to prescribe any positive rule approaching nearer to certainty than the rule of the common law, that each shall reasonably use his own right in subordination to the like reasonable use of all others.

With these views of the law regulating the use of public ways, we will examine the present case, as it appears on the exceptions.

We understand that a horse-railroad and cars are a modern invention, designed for the carriage of passengers, and, though not moving with the speed of steam-cars, yet with the average speed of coaches, omnibuses, and all carriages designed for the conveyance of persons.

The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit, for which these special modes of

using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement.

A franchise for the railroad, which the defendant was accused of obstructing, had been duly granted to the proprietors, which grant included the right to lay down tracks on a public highway, and also to use and maintain horse-cars thereon for the carriage of passengers.

Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers, necessary to the full use and beneficial enjoyment of the grant; and when such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement.

It appears that the proprietors of the horse-railroad, having received a franchise, had laid down a railway track, and had procured horse-cars, with suitable conductors, and were in the actual use of the track. The defendant, with a heavily loaded team, — it does not appear whether an ox team or horse team, — was on the public street driving from Charlestown to Boston, with one of his wheels on the railroad track, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed several hundred feet, and then turned off.

Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public by the grant of the franchise had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning

out. The wagon, therefore, is, for the time being, an unnecessary obstruction of the public travel, and therefore unlawful.

It is stated among the above-mentioned circumstances in the bill of exceptions, as if the two vehicles were upon an equality in this respect, that there was room on either side for either vehicle to turn out. But this is mere illusion; the wagon could turn out, the cars could not; *ad impossibilia lex non cogit.*

It is said above that it is usual for those in charge of heavy and slow teams to drive them with one wheel on the track, and that they could be driven much more easily in that place than in any other part of the street. This is no justification. Whilst the track was not required for the cars, perhaps the teamster had a right so to use it. But, when required for the cars, which could pass in no other mode, he had no legal right to consult his own convenience, to the great inconvenience, the actual injury of the equal rights of another.

It is no excuse that the defendant did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or that he did not slacken his rate of speed on their approach; it is a nuisance, if, for his own benefit, he violates the rights of others; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Nor is express malice, a disposition or desire to cause damage to another, as in case of malicious mischief, necessary to the completion of the offence. It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others, and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all necessary, natural, and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice,—a thing done *malo animo*,—in the sense of the law; and no other malice need be proved, to show the act to be a nuisance.

If it be said that the obstruction in this case was very slight, that the cars were delayed but a very short time,—the answer is, that this is very true, and the injury may be trifling in itself, but, vindicated and justified as it is in the argument, on the ground of right, it tests a principle of very great importance. If the driver of a heavily loaded

truck or wagon may, for his personal convenience, use one rail of the track, wilfully, for a few hundred feet, others may use the other rail for the like purpose, and for any distance which suits their convenience. Cars which, at the ordinary speed of horses in carriages, would pass a given space in one hour, may be three or four in accomplishing it. Passengers whose business requires them to be at the place of destination at a fixed time, and who expect and have a right to expect that it will be reached in that time, may find their business greatly deranged.

Men who, relying on the establishment of horse-cars for their daily passage, have fixed their domicil in one place and their ordinary place of business in another, may find their plans of life thus defeated. Indeed, without pursuing the effect of the right contended for into all its consequences, the establishment of such a principle might essentially impair the value of real estate in many situations.

We will now consider some of the points specially raised by the bill of exceptions.

1. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street, the most convenient to him, in the ordinary way, knowing that the car would be obstructed by such use.

If the term malice is here used in the sense of ill-will, a desire to injure another, as an actuating motive, the opinion of the Court is, that malice need not be shown, but that if a wilful intent to follow his own convenience in violation of the equal rights of others exists, it is sufficient, and no other malicious motive need be proved.

2. The defendant contended, that in the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if he was moving at the ordinary and proper rate of speed, was no obstruction, within the meaning of the statute.

This position we think is untenable. We think the corporation had a right, and, in reference to passengers, were bound to move at the rate of speed usual for vehicles for the carriage of passengers, drawn by horses; provided this right could be enjoyed without preventing the loaded team from moving at its usual and proper speed; and both could be done by the team ahead turning off the track, which the

car in the rear could not do. It was therefore the duty of the team, in the reasonable use of the public right, to do it. What was the usual and proper rate of speed of the one was not that of the other.

3. The evidence was properly left to the jury.

4. It was contended, that the right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they have previously done.

This position we think manifestly unsound. The legislature having granted a new and peculiar use of the highways, the right of the public to use them as they had done is thereby qualified, and must be adapted to such new use.

Suppose the legislature should authorize a canal to cross a highway, with a draw, to be raised while boats are passing; the public cannot use the highway, as they have previously done, at all times, but must use it in subordination to the new right granted.

So here, the law having authorized a horse-railroad, which cannot deviate from one line, other vehicles must conform their use of the way to such new and authorized use, although it prevents them, to some extent, from using it as they had previously done.

The 5th, 6th, 7th, and 8th prayers for instructions, we think, were rightly rejected, for reasons which are already sufficiently stated.

The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and *judgment entered on the verdict.*

Suffolk County.

JANE GREW ET AL. *v.* THE BROADWAY RAILROAD COMPANY.

1. By an act of the Legislature of Massachusetts, the board of aldermen of Boston were authorized to extend the location of the Broadway Railroad over such streets of the city as they should determine with the assent of the railroad company. They accordingly, on petition of the company, granted a location over certain specified streets to a fixed terminus, and the company accepted the location, built the road, and took tolls thereon. *Held*, that the board of aldermen had no power to grant a further location over other streets, the authority conferred by the statute having been exhausted when once exercised.
2. The board of aldermen of Boston, as surveyors of highways, are authorized by statute and ordinance "so to regulate the width and height

of the sidewalks of any streets as shall, in their judgment, be most conducive to the convenience and interest of the city." *Held*, that an existing sidewalk cannot be changed unless it appear from the vote of the board that they have exercised their judgment upon the subject.

3. The board of aldermen granted a location to the Broadway Railroad Company through Winter street and certain other streets of Boston; but the right to lay a track in Winter street was granted "upon the *express proviso and condition* that before the track is laid down in said street, the sidewalks on each side thereof shall be made of a uniform width of six feet, and at the time the track is laid down in said Winter street the roadway of said street shall be repaved with 'trap-rock blocks,' and the whole expense thereof shall be paid by the said Broadway Railroad Company." The order further provided, that the whole work should be done under the direction of the superintendent of streets, and should be approved by the committee on paving. *Held*, that the intention of the board of aldermen to alter the width of the sidewalks did not sufficiently appear from this order to authorize the company to make the alteration so as to fulfil the condition precedent annexed to their location.
4. The laying of a track for a horse-railroad in a public street of a populous city, is such an alteration of a highway as, if made without a grant of power to do so from competent authority, would constitute a public nuisance; and an abuttor upon a highway may be presumed to have such a special interest therein as to entitle him to a preliminary injunction against the creation of such a nuisance by a mere wrong-doer.

The bill in this case was filed June 12, 1860, and a preliminary injunction was granted immediately. On the 20th and 21st of July, a motion to dissolve the injunction was heard, and on the 25th of the same month the following opinion, in which the facts of the case sufficiently appear, was delivered by

MERRICK, J. Several interesting and important questions arise upon the motion of the respondents to dissolve the temporary injunction heretofore granted. And if it must be admitted that the solution of these is not free of difficulty, that concession indicates the necessity of the utmost care to prevent any material interference with acknowledged rights until the conflicting claims of adverse parties are fully examined and properly adjusted.

The complainants, in their bill, allege that part of them are the owners, and the others the occupants of a valuable estate abutting upon Winter street, in the city of Boston; that the respondents, acting under their charter, and under color of the authority supposed to be derived from a certain order of the board of aldermen, the legality of which is specifically denied, are now unlawfully about laying the rails of a horse-railroad track through said street, and, in con-

nection therewith, removing part of, and thereby much narrowing, the sidewalk in front of their estate; by means of which, if accomplished, the value of their estate will be essentially diminished, and they will be subjected to serious and irreparable injury, for which the common law affords no remedy.

The respondents contend, that if all their allegations are taken to be true, no sufficient or legal cause is shown for the injunction against them prayed for in the bill. And this upon the ground that the complainants do not set forth any such right or interest in themselves in the subject matter in controversy as will enable them to maintain their suit.

Without inquiring at this time into the rights of abuttors as owners in fee of the soil to the centre of a public highway, it is certain that they have a direct and immediate interest in it, which is liable to be greatly affected, by the work done upon its surface by the public authorities, by changes in its grade, and the manner in which it is from time to time kept and repaired for the public use. Every proprietor of land adjoining a public way, may, at his own pleasure, make improvements upon it by cultivation, or by the erection of dwelling-houses, stores, or other buildings, and may adapt these improvements to the then existing state, condition, and grade of the way. But such use of adjoining lands does not deprive the public of the right to make such changes and alterations in the way as shall best promote the convenience and secure the safety of all persons having occasion to travel or pass in any lawful manner upon it. Thus the grade may be changed; the surface may be lowered or raised; the whole or only a part of the entire location may be fitted for such use as a public highway may require.

But all highways must be kept in repair by the several towns and cities within which they are located, so as to be not only safe, but convenient for all persons having occasion to use them. And this obligation, by necessary implication, requires all such corporations, by their proper officers, to do any and everything within the limits of their location, which is essentially requisite or well adapted to the accomplishment of those objects. But if, in the execution of any lawful work intended to produce these effects,

injuries result to property adjoining the way, the owner is not without remedy.

The statute expressly provides, that when an owner of land adjoining a highway sustains damage in his property, by reason of any raising, lowering, *or other act* done for the purpose of repairing it, he shall have compensation therefor, — the amount of which in the first instance must be determined by the selectmen or mayor and aldermen, and in case of an appeal, properly pursued, by the verdict of a jury. General Statutes, chap. 44, sect. 19.

The general authority of towns and cities to keep and maintain all streets, ways, and roads in suitable repair for public use, is undoubtedly sufficient to justify them in so fitting and preparing the different parts of the surface of any particular highway as will best adapt it for any new method of transportation and travel upon it, which may, from to time, be discovered, if useful to the public and allowed by law.

But if, in such adaptation, the adjoining real estate of individual proprietors is injuriously affected, they are, by the express provisions of the statute, entitled to recompense commensurate with the damage sustained. If, therefore, the laying of iron rails for the track of a horse-railroad on Winter street, and the cutting off and narrowing the sidewalk in front of the complainant's estate, to make room for and accommodate it, had been done by the city of Boston, in the exercise of power and authority conferred upon it for that purpose, and the act should have caused damage to the estate of abuttors, they would have been entitled to recover compensation by pursuing the remedy specially provided for that purpose.

And if the complainants, in such case, would have had an interest sufficient to enable them to enforce against the city payment of the damages sustained, it is certainly very difficult to see why the same interest might not fully entitle them to an adequate remedy against a party who, without right or lawful authority, should do the same acts and produce the same injurious consequences. It would be absurd to assert that the law affords a complete remedy for the injurious consequences of acts which are lawfully done, but gives none if the same things are done without authority, and in violation of its provisions.

It cannot, of course, be denied that the construction of a

track for a horse-railroad by the laying of iron rails in a public street or highway in a populous city, would, if done without a grant for that purpose from competent authority, constitute a public nuisance. And it is a well-settled principle, that when private individuals suffer an injury quite distinct from that of the public in general, in consequence of a public nuisance, they will be entitled to an injunction and relief in equity, which may thus compel the wrong-doer to forbear, or, if necessary, to take active measures against allowing the injury to continue. (2 Story, Equity, sect. 924.)

Upon the hearing of the motion to dissolve the temporary injunction, no evidence was offered to show that the changes proposed and about to be made in the state and condition of Winter street by the respondents, as alleged in the bill, would be specially injurious to the complainants. Nor in such a preliminary proceeding as this does it seem to be requisite that proof to that effect should be produced. This being distinctly averred in the bill, and it being apparent from these allegations, and also from the statements in the answer, that a very material alteration of the highway, affecting in a greater or less degree the access to and enjoyment of the complainant's estate, will be produced by the construction of the railroad track, and an interference with and change of the sidewalk, sufficient damage to their property may, during its pendency, be presumed, to enable them to maintain a proper and suitable legal process and proceeding against a mere wrong-doer, whose acts create a public nuisance, and thereby necessarily to some extent injures and interferes with the lawful enjoyment of private property situate in its immediate vicinity. It is scarcely necessary to add, that even in such case the injunction cannot be made perpetual, without full proof upon the final hearing of the special damage complained of.

There is no controversy between the parties in reference to the authority under which the respondents claim the right to construct their railroad and alter and diminish the width of the sidewalk on Winter street. By Stat. 1854, chap. 444, the defendant corporation was established to construct, maintain, and use a horse-railroad from a point named in that part of the city known as "South Boston," over and upon streets afterwards to be fixed and deter-

mined by the board of mayor and aldermen, to the track of the Dorchester Avenue Railroad Company.

By another act of the Legislature, Stat. 1857, chap. 216, the respondents were authorized to extend the location of their railroad from the point last mentioned upon and over such streets within the city as might be determined by the mayor and aldermen, with their assent; and upon such determination they were authorized to construct, maintain, and use their railroad in conformity thereto.

By an order of the board of mayor and aldermen, passed on the 22d of March, 1858, in pursuance of the provisions of the statutes, permission and authority was given to the respondents to locate their road and lay down a track therefor from the junction of Fourth street with P street in South Boston, as one terminus, to a point in Summer street, distant thirty feet from the edgestone of the New South church, as the other terminus therefor.

And in conformity to the authority thus derived from the several acts of the legislature, and the order and determination of the board of mayor and aldermen of the city, all of which were duly assented to by the corporation, the respondents constructed and afterwards enjoyed the use of their railroad; affording accommodation to the public and deriving profit for the service performed. The regularity of such proceedings, and the rights which were acquired under them are fully conceded by the complainants.

But afterwards, on the 6th of June, 1860, the mayor and aldermen adopted an order, that in addition to the location already granted to the Broadway Railroad Company, they shall have the right to lay down a single track in the centre of Summer street to Washington street; across Washington street to Winter street; thence in the centre of the roadway of Winterstreet, as it will be after the sidewalks shall be reduced to a certain specified width, to Tremont street; thence to connect with the track of the Metropolitan railroad, and thence to other points not necessary now to enumerate; that the right to lay down a single track in Winter street be upon the express proviso and condition that before the track is laid down in said street, the sidewalks shall be made of a uniform width of six feet, the roadway of the street repaved with "trap-rock blocks," at the expense of the respondents, and the work to be done under the direction and supervision of the superintendent of streets, and to his satis-

faction; and also to the approval of the Committee on paving.

And the respondents rely upon this order as a sufficient authority to justify them in laying down the rail track for their road in Winter street; and their right to do so depends confessedly upon the legal validity of this order.

The order of the mayor and aldermen of the 22d of March, 1858, by which the respondents acquired the right to construct, maintain, and use their railroad as far as Church Green, was a determination by them in relation to the streets over which the road should or might be extended.

This determination was clearly within the scope of the authority conferred upon them. By the provisions of the charter of the respondents, the termini of the roads were fixed by a clear and definite description, and within those points the mayor and aldermen were authorized to determine "from time to time" within what streets the rails of the road should be laid.

But when afterwards, by the act of 1857, authority was given for the extension of the road, the point to which it was to be or might be carried, was not fixed; but it was left to the mayor and aldermen to determine upon and over what streets in the city it might be constructed. This having been once done, no power remained to be exercised. The grant of authority cannot be construed as a continuing power.

It was left in the first instance, to the discretion of the board or tribunal, without limitation. But an order for the additional location having been made, the power conferred was then fully executed. The mayor and aldermen were not clothed with authority to make repeated extensions, adding from time to time new powers and new rights to the railroad corporations. A grant of such authority is to be construed strictly.

The legislature confided to the officials of the city, who might well be supposed to understand and appreciate the existing occasion for the new mode of transportation of passengers in public conveyances, and they accordingly were entrusted with an authority fully adequate to the existing exigency.

But without express words, or the use of language from which a necessary implication to that effect would arise, it

is not to be presumed that the legislature intended to authorize repeated extensions of a road which, if calculated to afford accommodation to one class of the community, unavoidably interfered, to some degree, with the convenience of others in the use of public highways.

This construction of the statute is not different from that which is applied to the provisions of other statutes not wholly dissimilar, giving to county commissioners power to lay out public highways. When a petition is presented to that board, asking for the location of a way from one place to another, not defining the line of road, every route between the two points is open for examination and adoption.

But after an adjudication has been made that the public convenience and necessity require the location and establishment of a way on a particularly defined line, and the road has been actually built, it has never been pretended that without new proceedings instituted upon a new petition, the commissioners have power to make alterations or changes in the route and direction or in the length and extension of the road.

The order, therefore, of the mayor and aldermen, of the 22d of March, 1858, must be considered as an exercise of the authority conferred upon them; and they have no further authority to act in the premises. This determination is in the nature of a judgment which binds all parties, and by which the board is not less bound than all others.

It follows as a necessary consequence that the order of the board of the 6th June, 1860, was not within its competence; and could not, therefore, confer any right or concede any privilege to the respondents; and it can afford them no justification for any interference with the roadway or sidewalk in Winter street.

But there is a still further difficulty, which it appears to me creates an insuperable obstacle to the claim of right on the part of the respondents to occupy the roadway of Winter street with their railroad tracks. By the order of the mayor and aldermen, of the 6th June, 1860, even supposing they had a right to adopt it, the respondents were not to lay down their rails in the street until the sidewalk on each side thereof should be reduced throughout its whole length to a uniform width of six feet.

The complainants insist not only that the sidewalks have

not been reduced to the prescribed width, but that no authority has been conferred upon the respondents, or upon any city official in behalf of the city, so to reduce them.

The only action by the mayor and aldermen in relation to the reduction of the sidewalks, is found in the above-mentioned order of the 6th of June, 1860, by which it is provided that the whole work, including doubtless that to be done on the sidewalks as well as on the repavement of the streets, shall be wholly at the charge and expense of the respondents, and done under the direction and supervision of the superintendent of streets, and to his satisfaction, and be approved by the committee on paving.

The respondents contend that these provisions necessarily import a determination by the mayor and aldermen that the width of the sidewalks shall be changed, and reduced to the uniform width of six feet.

By Stat. 1833, ch. 128, the city council of the city of Boston were authorized to empower the surveyors of highways "so to regulate the width and height of the sidewalks in the several streets, as would in their judgment be most conducive to the convenience and interest of the city." Afterwards, by an ordinance duly enacted, this power was conferred on them, and the mayor and aldermen are made surveyors of highways.

The mayor and aldermen therefore have, under this statute and ordinance, full power and authority upon this subject, and their adjudication or determination as to the height or width of any sidewalk in any street in the city is final and conclusive, and is not open to be reversed by any other tribunal. No question of expediency remains after their determination to be considered by any court or tribunal where an appeal can be made.

And, therefore, the present inquiry is limited to the mere question of fact, whether the mayor and aldermen have, in reference to the sidewalks in Winter street, undertaken to determine what the width of them shall be. In looking at their order it is found that all they have expressly ordered is, that no railroad shall be constructed by the respondents before the sidewalks are reduced to a certain specified width, and that the work of such reduction shall be done at their expense; but there is a failure of any order that the width of the sidewalk shall be changed.

It certainly cannot be necessary that the judgment of the surveyors, that particular changes will be conducive to the convenience and interest of the city, shall be expressed in the very words of the statutes, or in any particular phraseology. But it must appear from their vote or votes, if they have passed any on the subject, that they have undertaken and intended to exercise their judgment on the subject. If this has not been done, existing sidewalks are not to be changed at all.

In this instance it is not suggested that they have done anything or exercised any judgment on the subject, unless it was by the adoption of the order of 6th of June, 1860. The terms of that order are at least very uncertain and doubtful as to the intention on the part of the board of aldermen thereby to prescribe alterations of the sidewalks.

The railroad is not to be constructed before they are changed, and brought into a specified condition; and it is by no means inconsistent with the terms of that order to suppose that the mayor and aldermen intended to postpone the time when the work of laying rails in the street should be commenced until they could satisfactorily to themselves adjudge that the proposed alteration would be conducive to the convenience and welfare of the city. Grants of power or of rights which will be of much advantage to one party at the possible expense or to the possible disadvantage of others cannot be upheld by doubtful and ambiguous provisions.

And therefore as it does not clearly affirm that any lawful provision has been made for the alteration of, or the interference with, the sidewalks on Winter street, by which they may be lawfully narrowed to the uniform width of six feet, the contingency upon which a railroad track may be laid in that street has not occurred; nor have the respondents shown that they may, under the supervision and direction of the superintendent of streets, undertake the work of altering and reducing the sidewalks.

For all these reasons I am of opinion that the motion of the respondents for the dissolution of the temporary injunction, heretofore imposed upon them, ought not to be granted; and that no further proceedings in relation to the construction of the proposed railroad ought to take

place until the rights of the respective parties are definitely settled.

This may be done at an early day; and as the public, as well as individuals more immediately connected with this line, have an important interest in the decision, the Court will feel it to be its duty to adopt all practicable measures to bring on a final hearing, and to cause the rendition of a final judgment at the earliest possible period.

Motion to dissolve injunction is disallowed.

B. R. Curtis and Geo. Putnam, Jr., for Complainants.

John A. Andrew and Samuel W. Bates, for Respondents.

Supreme Judicial Court of New Hampshire.

Rockingham.

DENNETT *v.* DENNETT.

Devise — Rule in Shelley's case — Contingent remainder.

A devise as follows: "I give and devise to my son, Mark Dennett, all the residue of my estate, to descend to the youngest son of his body, lawfully begotten, and from him to the oldest male heir of said youngest son of his body lawfully begotten, and, in failure of such issue, then to the heirs of said Mark Dennett forever;" must be construed to give to Mark Dennett an estate for life, and to his youngest son, surviving him, a contingent remainder for life.

If by virtue of the rule in Shelley's case, Mark Dennett by the union of his estate for life, and of the remainder to his heirs in fee, becomes owner of the fee, yet the two limitations become united in him, only until the intervening limitations become vested, and must then open to admit such limitations as they arise.

A contingent remainder is not barred by a conveyance under the statute of uses, nor under our statute; though it may be by a fine or feoffment.

LOVETT *v.* BROWN.

Lien of mechanics or manufacturers — Not assignable or attachable.

A mechanic's or manufacturer's lien is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer, personal to the party in whom it exists, and not assignable or attachable as personal property, or a chose in action, of the person entitled to it.

BRIGHTON MARKET BANK *v.* PHILBRICK.

Notice to indorser — Parol testimony — Due diligence.

Upon the question of due diligence in giving notice of the dishonor of a note to the indorser, the result of inquiries made subsequent to the sending of the notice is immaterial and incompetent.

Parol testimony is inadmissible to show the contents of a written memorandum, the loss of which has not been shown.

The holder of a dishonored note is bound to exercise ordinary or reasonable diligence in ascertaining the residence or business address of the indorser, and in forwarding the notice to him accordingly.

If he inquire of persons, who, from their connection with the note or their acquaintance with the indorser, are likely to know his residence, and are not interested to mislead him, and is distinctly told where the indorser resides, and in good faith seasonably acts upon the information thus obtained, it is due diligence on his part.

Where the holder of a dishonored note, not knowing the residence or business address of the indorser, went to the principal hotel in the village, where the indorser was accustomed to do business; that at which men of the same occupation with the indorser usually stopped, and from the direction of which the holder had noticed the indorser coming to his own place of business; and, upon inquiry there, was distinctly informed that the indorser resided in a particular town, whereupon he in good faith seasonably forwarded the notice to the indorser at that town,—*Held*, that this was due diligence in the holder.

SMITH *v.* JEWETT.

Money — Specific legacy — Executor — Assumpsit.

Money found after the testator's death in a secret drawer of a chest belonging to him, does not pass by a specific bequest of the chest, but is a portion of the residuum of the personal estate, for which the executor is bound to account.

If the executor permit his wife to appropriate such money to her own use, such appropriation becomes his own act, and makes him chargeable for the money upon his administration bond.

Assumpsit cannot be maintained, by the residuary legatee of the estate, against the wife of the executor after his death, for the money thus appropriated.

SHEAFE *v.* SHEAFE ET AL.

Creditor's bill — Alimony — Injunction.

Where property is subject to execution, a creditor who has obtained a specific lien upon it, by attachment, judgment, or the issuing of an execution, may maintain a bill to set aside or remove a fraudulent conveyance or obstruction to a levy thereon.

Under the provisions of the statute, the court may make such orders in relation to the property, real or personal, of a husband ordered to pay alimony to his wife, as may be necessary to carry the decree for alimony into full effect and protect the rights of the wife.

While parties are enjoined in chancery against aiding or assisting another in conveying or otherwise disposing of his property, they will not be permitted to secure an alienation thereof to themselves by proceedings at law against him as their debtor.

A perpetual injunction against one's alienating his interest in certain property, as against the plaintiff's claims upon it, gives the plaintiff an equitable lien upon that interest to the extent of those claims, at least as against the parties to the suit in which the injunction issued.

PRESCOTT ET AL. *v.* FELLOWS.

Submission — Award.

An award of arbitrators is void, if, by the submission, they were to decide upon moral and equitable, as well as upon legal grounds; but the award shows that moral and equitable considerations, which would have led them to a different result, were wholly disregarded.

Strafford.

WORSTER *v.* GREAT FALLS CO.

Mortgage — Foreclosure — Lease — Flowage.

An acknowledgment in writing by a mortgagor, that the mortgagee has entered and taken peaceable possession of the mortgaged premises for the purpose of foreclosing, that

he is in full and lawful possession, and an agreement that any entry by the mortgagor during the year for the purpose of taking the crops and carrying on the premises shall not be considered, treated, or claimed to be in derogation of the mortgagee's possession, but in subordination to it; is not evidence of a foreclosure of the mortgage, nor of actual possession against a stranger.

A lease by the assignee of a mortgage not foreclosed, not in actual possession, will confer no right to sue for flowage.

Corser *v.* Paul.

Cashiers — Conversation — Silence — Estoppel.

A cashier of a bank has power *prima facie* to indorse for collection notes discounted and notes deposited to be collected, or as collateral security.

It is sufficient evidence of a ratification by the bank of a cashier's indorsement, that the bank prosecutes the suit in the name of the indorsee.

A conversation between the principal signer of a note and a supposed surety, who denied his signature, after the latter had seen the note, in the absence of any person interested for the holder, was held incompetent to affect the latter.

The silence of a party, to whom a note, purporting to be signed by him, was shown with a request to pay it, is competent evidence of his signature being genuine, or if not, of his assent to be bound by it.

Such silence does not operate as an estoppel upon the party to deny, or disprove his signature, unless the holder has been led to change his position, or otherwise act upon it to his injury.

Great Falls Bank *v.* Farmington.

Liquor agencies — Credit of towns — Admissions — Depositions — Defence to indorsed note.

By the act of July 14, 1855, every city and town in the State was required to establish one or more agencies for the purchase and sale of spirituous and intoxicating liquors, for medicinal, mechanical, and chemical purposes only, and wine for the commemoration of the Lord's Supper. Under its provisions, the selectmen of any town, or the liquor

agent by them appointed, might purchase upon the credit of the town, the liquors necessary to supply the agency or agencies, and the selectmen might rightfully bind the town by a note given for the price of such liquors.

Under the rule of court, providing that the signatures and indorsements of all instruments declared on shall be considered as admitted at the first term, unless notice be given upon the docket that they are disputed within the first four days of that term, and an affidavit filed that such denial is not for the mere purpose of delay, if the execution or indorsement of an instrument declared upon is not denied, both the genuineness and authority of its execution and indorsement are to be taken as fully and conclusively admitted for all purposes, and no evidence to controvert either can be received, until the defendant is relieved from the operation of the rule.

Under the existing law, a deposition may properly be used for any of the causes specified in the statute, although taken to be used for a different cause, which no longer exists.

The note of a town, properly given by its selectmen, in the hands of an innocent indorsee and purchaser thereof for value before maturity, without notice or knowledge of any illegality in its consideration, is not open to the defence that it was given for the price of liquors sold in violation of the laws of this or any other State.

VARNEY *v.* SCHOOL DISTRICT NO. 3, IN FARMINGTON.

School District — Prudential Committee — Teacher.

A school district is liable for services performed by a teacher, under a contract, made with a prudential committee, legally appointed by the selectmen, if the contract was a reasonable one and made in good faith, although the teacher was notified not to teach any longer by another prudential committee, legally appointed by the selectmen, during the continuance of the school, and more than a year after the appointment of the first committee.

Carroll.

MILLER *v.* TOBIE.

Parol agreement—Improvements.

One who enters upon land of another, with his consent

and under a parol agreement to purchase, and makes improvements thereon, solely upon the expectation of acquiring the title, cannot recover of the owner the expense of such improvements, if the owner has merely refused to execute the parol agreement, but has not turned the other out of possession, or deprived him of the benefit of his improvements.

Sullivan.

GUNNISON *v.* GUNNISON.

Subpœna — Fees — Action — Attendance — Removal out of State.

A witness who is subpœned and in good faith attends court as a witness without being paid, may maintain an action against the party summoning him, for his legal fees for travel and attendance as fixed by statute; and he is equally entitled to recover such fees, if he attends and is examined, without being summoned, or if he is summoned and attends, without being examined.

A witness who is summoned to attend court and paid for his travel and one day's attendance, if he remain in attendance in good faith after that day, until the cause is tried, or otherwise disposed of, without notice that his attendance is no longer required, is entitled to his fees for such additional attendance, and, if they be not paid, may maintain an action to recover them of the party summoning him.

A witness who is summoned and paid his fees while residing in this State, but who afterwards removes to another State, is bound to attend court in pursuance of the summons, unless before removing he shall give notice of his intention to leave, and be released from his obligation.

HOWE ET UX. *v.* PLAINFIELD.

Representations of the sick — Defects in highways — Liability of towns.

The representations of a sick or injured person, as to the nature, symptoms, and effects of the disease, or injury under which he is suffering at the time, are admissible and competent evidence tending to show his actual condition.

The liability of a town for the damages occasioned by a defect in a highway, does not depend upon the fact whether or not its officers or agents had actual notice of the existence of the defect, provided it were of such a char-

acter and of such continuance at the time of the accident, that the town was reasonably bound, under all the circumstances, to have remedied it.

CARR ET AL. *v.* MOORE.

Damages — Price paid — Sales — Relationship.

The proper measure of damages in an action for fraud and deceit in the sale or exchange of property retained by the purchaser, is the difference between its actual value and its value as represented to be at the time of the sale or exchange,— the price paid being strong but not conclusive evidence of its value as it was represented to be.

Where the price paid for one animal was another animal, the age, appearance, and qualities of the latter animal, and the price for which it was sold, are competent to be considered by the jury in determining the value of the former.

Upon a question as to the value of property, the price at which other property of like character was actually sold in the vicinity at or about the same time, may be shown in evidence; and, in the case of horses, evidence of such sales a year after the date of the transaction in controversy, is competent.

The state of feeling and the relationship of a witness towards a party, may properly be shown to be considered and weighed with his testimony.

Cheshire.

PETTIGREW *v.* CHELLIS.

Case — Scienter — Proof of fraud.

In case for fraud and deceit in the sale of property not warranted, the *scienter* is material, and must be both averred and proved.

Where the gist of the action is an alleged false and fraudulent representation, made by the defendant, in the course of negotiations as an inducement to a contract, the plaintiff must aver and prove that the defendant knew the representation to be false when he made it; and this proof is not established by showing, that, although the defendant believed it to be true when he made it, yet, after the negotiations were concluded, and had been consummated and merged in a written contract without warranty, he ascertained it to be

false, and neglected to communicate his knowledge to the plaintiff.

ESTY *v.* LANG ET AL.

Nominal creditor — Bona fide conveyance.

A person who is made a nominal creditor for the purpose of defeating a prior conveyance from the debtor to a *bona fide* creditor, which conveyance is absolute on its face, but in fact made to secure a debt, cannot on that ground defeat the conveyance.

Grafton.

JEWELL *v.* HOLDERNESS.

Increase of damages — Parties to petition.

A petition for increase of damages, lies in the case of a highway laid out for the accommodation of an individual.

The town is not properly made a party to such a petition, since the damages are, by statute, to be paid by the party for whose accommodation the highway is laid; and the notice of the petition should be given to such party.

HALL *v.* CLEMENTS.

Application of Payments.

If a party indebted upon a running account, partly for legal and partly for illegal sales, make payments generally upon account, those payments are to be applied to the items of charge for legal sales; but if at any time the amount paid exceeds the amount due for legal sales, the balance will be applied to pay for the goods illegally sold.

It will not be presumed, under such circumstances, that the payments are made in advance to be applied on future legal sales.

ROGERS *v.* MITCHELL.

Practice in chancery — Fraud — Premature suit.

Upon a hearing on bill and answer, the allegations of the answer must be taken to be true, because the defendant is precluded from proving them.

Though all the allegations of a bill are admitted by the answer, yet if any fact, material as a defence, is stated in the answer, a replication must be filed, to give the defendant an opportunity to prove it, if it is not intended to be admitted.

A specific performance of a contract will not be decreed in favor of one who is chargeable with any fraud or unfairness in relation to the contract.

Where it was agreed, in writing, between the parties to a mortgage, conditioned for the payment of certain notes in three years, that the mortgagor may cut and haul off timber from the mortgaged premises, and shall have the privilege of selling the property to pay the mortgage debt, for one year after the three years; it was *held*, that a suit to foreclose was premature in equity before the end of that year.

GALE *v.* BELKNAP INS. CO.

Intention — Policy of insurance — Effect of proviso.

The intention of a party not manifested by any act, or declaration, is not competent to be proved by his own testimony, to affect the rights of another person.

Where it is stipulated that a policy shall become void, if any subsequent insurance shall be made on the property without consent, the first policy will not be avoided, except by a valid and legal policy, effectual and binding on the assurers.

If, then, a second policy contain a proviso, that it shall be void, if any other insurance exists on the property, without consent of the company insuring, the second policy is inoperative and invalid, by reason of the previous policy, and the earlier policy is not affected by it.

LOCKWOOD *v.* KELSEA.

Money had and received.

The action for money had and received is an equitable one, and in general may be maintained, wherever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff, which in equity and good conscience he ought to refund to him.

EAMES *v.* EAMES.

Witness — Presumption — Account — Submission.

Either party is entitled, if he insist upon it, to have a witness state fully upon the stand all the details of his testimony, and the court cannot properly limit the direct examination of a witness to the single inquiry whether or not

he has heard the testimony of a preceding witness and concurs therein.

A state of relations between parties once proved to exist, is presumed to continue, until some change is shown to have occurred.

The mere making out of an account, several months after the date of the alleged indebtedness, has no tendency to show its correctness.

Where a submission by parol or in writing, is made by private parties to a given number of persons, without any express authority given, or to be inferred from the manner or circumstances of the submission, that a smaller number may decide, an award or decision will be void unless made by all of them.

BUGBEE *v.* THOMPSON ET AL.

Service of writ.

Where two defendants both reside in the same house, it is not a sufficient service of a writ upon them to leave a single copy or summons at the common residence, or to give such single copy or summons to one of them at the dwelling-house of both.

PENNOCK *v.* ELA.

Time—Specific relief—Amendment.

In equity, time is not of the essence of a contract, unless clearly made so by its terms, or the understanding of the parties.

Where a bill contains a prayer for specific and also for general relief, the plaintiff may have other specific relief, provided it be consistent with the case made by the bill; but, he cannot desert the relief prayed, and, under the prayer for general relief, ask and obtain specific relief of another description, unless the facts and circumstances charged or implied in the bill will maintain it.

Where the original bill asked for the specific performance of a contract to convey land, alleging performance of the contract by the plaintiff in paying the stipulated price, but without any averment of the time, place, and circumstances of the payment, or of any settlement between the parties, and sought for a discovery by the defendant of all the circumstances relating to the alleged payment; *held*, that an amendment was admissible requiring an account to

be taken, and, if any balance proved to be still due, asking that the plaintiff might be permitted to pay it; and that the relief originally sought might be granted, with the modification that the plaintiff first pay the balance found due upon such account.

Coos.

PETITION OF ROBERT CUMMINGS.

Naturalization — Intention — Residence.

A petition for naturalization under the first section of the act of March 26, 1824, must allege it to have been the *bona fide* intention of the applicant, for three years next preceding his application, to become a citizen of the United States; and such allegation must be proved to the satisfaction of the court.

It is not necessary in a petition for naturalization, under the act of April 14, 1802, for the applicant to allege or prove, that he has resided within the State or Territory where the application is made during the year next preceding his application.

BLISS *v.* BRAINARD.

Lex loci — Burden of proof — Incidents of illegal contract.

The validity of a contract is to be determined by the law of the place where it is made.

Where the sale of liquors, except by persons duly authorized and for particular uses, is prohibited, it is incumbent upon the plaintiff, in an action to recover the price of liquors sold, to show affirmatively that he was duly licensed to sell them, and that they were sold for a lawful use.

Where the sale of liquors is unlawful, no recovery can be had for them, or for the casks in which they were contained, and which were purchased only for facilitating the illegal sale, nor for the freight and cartage of the liquors illegally sold from the shop of the vendor to the place of business of the vendee, in furtherance and completion of such illegal sale, there being in fact but a single contract between the parties.

COPP *v.* WHIPPLE.

Non-resident taxes — List to be signed.

The list of non-resident taxes must be separately signed

by the Selectmen, when committed to the collector for collection; and it is not sufficient that it be specifically referred to in the warrant to the collector accompanying it.

MARRIED WOMEN.

We propose to examine the statutes and decisions of Massachusetts relating to married women since May 1, 1836, when the Revised Statutes went into operation. We cannot be sure that we have noticed all the changes made in the last twenty-four years, in this extended branch of the law; but the more important will be found arranged under the following heads: *Marriage—Ante-nuptial debts—Necessaries—Real Estate—Joint acts in relation to the wife's land—Her personal property—As feme sole and sole trader—Joint suits—Witness—Divorce—Her will—Widow's allowance—Her election—Her dower—Homestead exemption.*

A glance will show how numerous and rapid the changes have been since 1850. The *General Statutes*, which went into operation June 1, 1860, are mainly a collection, without material amendment, of statutes cited in this examination; and they provide, chap. 181, § 9, "so far as their provisions are the same as those of existing laws, they shall be construed as a continuation of such laws, not as new enactments." The following collection of statutes and decisions relating to married women, may therefore be found useful in examining the General Statutes of 1860 upon this subject.

Marriage.—The age of consent in Massachusetts is not altered by the stat. 1853, chap. 335. It is still fourteen for males and twelve for females, as at the common law. Such marriages are valid without consent of parents or guardians; penalties, however, are imposed on those who celebrate them. *Parton* v. *Hervey*, 1 Gray, 122. A suit was brought under st. 1852, ch. 254, by the mother, against a third person, for enticing away her daughter, fourteen years of age, and procuring her marriage to a man of bad character, by means of fraudulent representations to the city clerk and magistrate as to her age. *Held*, that the mother had no cause of action at common law, or under the statute, the marriage being valid. *Hervey* v. *Moseley*, 7 Gray, 479.

The act of 1852, ch. 254, imposing a penalty on the clandestine marriage of females under sixteen, has received no further construction. Nor has any case been decided under the act of 1857, ch. 34, establishing penalties for certain false statements to officers in respect to persons proposing to marry. The prohibition by the Revised Statutes of the intermarriage of whites with Indians, negroes, and mulattoes, was removed by st. 1843, ch. 5. The clause of R. S. ch. 75, § 1, forbidding a man to marry "his mother's sister," has been construed so as not to invalidate the marriage in England of an Englishman to his mother's sister, prior to st. 6 Wm. 4, ch. 54. Since that statute, such marriage in England would not be recognized here. *Stutton* v. *Warren*, 10 Met. 451. By st. 1845, ch. 222, marriages were not to be declared invalid on the ground of insanity or idiocy of either party, upon the trial of any collateral issue, but only in a process duly instituted during the lifetime of both parties. Under st. 1857, ch. 305, relating to witnesses, it has been held that the husband cannot be a witness in a libel for divorce against the wife, on the

ground of insanity at the time of the marriage, she appearing and answering the libel by guardian *ad litem*. *Little* v. *Little*, 13 Gray, 264.

The act of 1846, ch. 197, enlarged the causes enumerated in R. S. ch. 76. §§ 1 and 2, for applying for a divorce on the ground of a void or invalid marriage, and permitted, by leave of court, a libel to be filed for annulling such marriage for *good cause*. And by st. 1855, ch. 27, sentence of nullity may be pronounced, though the marriage is celebrated out of the commonwealth, if the libellant at the time of marriage and of filing the bill was domiciled here.

The act of 1840, ch. 84, extended to all cases by the act of 1841, ch. 20, permitted the fact of marriage to be proved by the admissions of the party against whom the process is instituted, or by any circumstantial or presumptive evidence from which said fact may be inferred. *Means* v. *Welles*, 12 Met. 360. Such proof is not to be confined to connections or members of the family. *Knower* v. *Wesson*, 13 Met. 143.

For the effect to be given to a marriage certificate under said acts, see *Commonwealth* v. *Morris*, 1 Cush. 392. As to the evidence of cohabitation under the statute, and the presumption of marriage therefrom, see *Commonwealth* v. *Belgard*, 5 Gray, 95.

The presumption of law, that a husband, absent and unheard from, is alive until the expiration of seven years, was enforced in *Commonwealth* v. *Mash*, 7 Met. 472, in the case of a party marrying and cohabiting with a second husband in the lifetime of the first; exposing the wife to indictment under R. S. ch. 130, § 2; though the second marriage was in good faith, and the cohabitation ceased on the reappearance of the first husband after an absence of four years.

Under the same statute and st. 1841, ch. 83, a woman was held indictable for unlawful cohabitation, who married in Vermont during the lifetime of her first husband, who had obtained in Massachusetts a divorce from her on the ground that she had deserted him for five years. *Commonwealth* v. *Hunt*, 4 Cush. 50.

Breach of Promise.—The rule laid down in *Stebbins* v. *Palmer*, 1 Pick. 71, that the action, where no special damage is laid, does not survive, has not been altered by st. 1842, ch. 89. The loss of time, and expenditure of money in preparing for the marriage are not special, but incidental damages. *Smith* v. *Sherman*, 4 Cush. 408.

Ante-nuptial Debts. The husband, though an infant, was held liable for his wife's ante-nuptial debts, in *Butler* v. *Breck*, 7 Met. 164.

The case of *Warren* v. *Williams*, 10 Cush. 79, defines the exact limit of the husband's liability at common law to be during the lifetime of the wife. The husband being sued with his wife for her debt, *dum sola*, allowed, after her death, judgment to go against himself by default; after paying the debt, he claimed the amount of his wife's administrator, which was refused. He afterwards in equity, *Warren* v. *Jennison*, 6 Gray, 560, claimed payment out of his wife's real estate; but the court again refused him relief, on the ground that he had taken no assignment of the mortgage on which the original judgment was obtained against him. All questions in regard to the husband's liability for the wife's ante-nuptial debts will be removed by the st. 1855, ch. 304, § 2, which applies to parties *thereafter* married, exempting the husband from suit for such debts; but holding the wife and her property liable therefor, as if single.

Wife's Necessaries.—The law is not changed that obliges a husband to provide his wife with necessaries. Its extremity was probably reached in *Shaw* v. *Thompson*, 16 Pick. 198,—decided before the Revised Statutes,—where a husband who was *non compos*, and in the almshouse, was held

liable. In *Burlen* v. *Shannon*, 3 Gray, 387, it was held that a decree dismissing, for want of evidence, the wife's bill for divorce on the ground of extreme cruelty, did not preclude a third person from suing the husband for necessaries furnished the wife. The law holds medicines to be necessaries, *Mayhew* v. *Thayer*, 8 Gray, 172; but it does not recognize mesmeric prescriptions as medicines. *Wood* v. *O'Kelly*, 8 Cush. 408. The continued harsh language, as well as conduct, of the husband to a son of the wife, in her presence, may be given in evidence on a charge of cruelty towards a wife, in a suit for necessaries. *Mayhew* v. *Thayer*, 8 Gray, 172.

The same facts upon which a divorce from bed and board may be granted to the wife, *prima facie*, authorize her to leave her husband's house with a credit for necessaries, which may be recovered from the time of such leaving, until the decree of divorce and alimony against the husband. *Hancock* v. *Merrick*, 10 Cush. 41. A husband, whose wife has left him, with his express or implied assent, or in consequence of his cruelty and neglect, is bound to pay for necessaries furnished to her while thus absent, until he goes or sends for her to return. *Mayhew* v. *Thayer*, 8 Gray, 172.

A town, supporting a neglected wife, may recover of her husband the amount expended by them for her support as a pauper; but no additional amount for supplies to her, suitable to her condition in life. *Munson* v. *Williams*, 19 Law Rep. 412. Under st. 1859, ch. 230, if not under st. 1857, ch. 305, the wife may be a witness in all suits brought against her husband involving a claim for necessaries.

Wife's Real Estate.—The wife's incapacity to convey, without her husband, any interest in her real estate has been illustrated in several cases since the Revised Statutes. In 1852, it was held, in *Concord Bank* v. *Bellis*, 10 Cush. 276, that her mortgage given in 1842, in the lifetime of her husband, who had temporarily deserted her, was void, not voidable, though made by her to secure the purchase money. In 1854, in *Lowell* v. *Daniels*, 2 Gray, 161, the mortgage deed of a married woman, with covenant of warranty, executed by her in her maiden name, and ante-dated for purposes of concealment, was held to convey no interest in her land to the grantee; and that her heirs, after her death, were not estopped from claiming the land. In this case the mortgagee had been before denied relief in equity. *Lowell* v. *Daniels*, 2 Cush. 234.

The great strictness in conveying the wife's land, implied in former decisions,—*Nightingale* v. *Burrell*, 15 Pick. 104, *Lithgow* v. *Cavanagh*, 9 Mass. 161, *Lufkin* v. *Curtis*, 13 Mass. 223,—was not relaxed by the Revised Statutes.

In 1840, in *Bruce* v. *Wood*, 1 Met. 542,—a deed signed by husband and wife "in token of her relinquishment of all her right in the bargained premises," the deed containing no other reference to her, was held not to pass her right in fee, and she was permitted to maintain on her husband's death a writ of entry.

In *Raymond* v. *Holden*, 2 Cushing, 264, where the deed was signed by husband and wife, she releasing dower only, her heirs were held not to be estopped from recovering the land twenty-nine years after such conveyance.

St. 1845, ch. 208 has been held to make the following modifications in regard to the wife's control of her real estate. A married woman under this statute is not obliged to make her husband a party to a bill in equity, seeking relief from a mortgage of her lands, though her husband joined her in making the mortgage. *Conant* v. *Warren*, 6 Gray, 562. As to real estate properly her own, she may convey it without her

husband joining in the deed, subject, however, to his curtesy, *Beal* v. *Warren*, 2 Gray, 447. But a conveyance to her during marriage, *not to her separate use*, does not make the estate her own, under the statute, and she cannot mortgage it without her husband. *Gerrish* v. *Mason*, 4 Gray, 432.

Since these decisions the statutes have enlarged the powers of married women, and enabled them to convey, in some instances, their real estate without the signature or consent of the husband. By st. 1855, ch. 304, § 1, in connection with st. 1857, ch. 249, § 1, "the sole and separate" real property of all married women, if acquired before marriage, and the real property after marriage, coming to them by any means, except through their husbands, is to remain their sole and separate property; not subject to the husband's disposal or liable for his debts.

By the same statutes, the wife may lease her real estate for one year, without consent of her husband. She may, also, without such assent, convey her real estate, subject to his curtesy. In case her husband is sick, insane or absent from the Commonwealth, or for other good cause, she may, on petition, be allowed to convey her lands without him; he having notice, if within the Commonwealth.

The officers authorized to grant such license to convey her real estate are Judges of the Supreme and the Superior Courts, and Judges of Probate, in term time or vacation, and in any county. Nothing in these statutes is intended to invalidate any marriage settlement or contract made or to be made in Massachusetts or elsewhere, or to authorize the husband to convey property to his wife, in any case where he had not already such authority by law.

Where a married woman becomes insane, and her husband is unable to support her, provision is made by the st. 1855, ch. 233, for the sale of her real estate, on petition of her husband or the selectmen made to the judge of probate.

An instructive decision in regard to the conveyance of husband and wife's real estate, before the Revised Statutes, may be found in *Learned* v. *Cutler*, 18 Pick. 9; another in regard to lands held in trust for the use of a married woman, who was obliged to leave her husband for his misconduct, without obtaining a divorce, may be found in *Ayer* v. *Ayer*, 16 Pick. 327. For the stringent effect of an ante-nuptial settlement, in case of a divorce, see *Babcock* v. *Smith*, 22 Pick. 61, under the head of *Divorce*, hereafter.

Husband and wife, and their acts in relation to her land.—When husband and wife join in a written contract with a mechanic to erect a building on her land, the mechanic acquires under Revised Statutes, ch. 117, no lien as against the wife; but the husband's tenancy by the curtesy (acquired after the date of the contract and petition for sale), is thereby put under lien. *Kirby* v. *Tead*, 13 Met. 149.

A husband occupying lot A, belonging to his wife, took possession of lot B, adjoining, and disseised the owner thereof. *Held*, that his wife continuing the disseisin of lot B, after his death, could not tack her disseisin to that of her husband. *Sawyer* v. *Kendall*, 10 Cush. 241.

Personal Property.—Before the Revised Statutes the presumption of law was, in cases of indictment, that personal property, in the hands of the wife, belonged to the husband, and should be so charged. *Commonwealth* v. *Manley*, 12 Pick, 173. Since the Revised Statutes, (*Commonwealth* v. *Davis*, 9 Cush. 283), the presumption is not changed, though the husband has been absent three years, and the money is sent by him for the wife's support. Since st. 1855, ch. 304, the presumption is still the same in cases of indictment. *Commonwealth* v. *Williams*, 7 Gray, 337.

During his lifetime the husband, at his option, could reduce to his own possession the wife's choses in action; he might sue, after her death, in his own name, for a legacy left her during coverture. *Hapgood* v. *Haughton*, 22 Pick. 480; *Hayward* v. *Hayward*, 20 Pick. 517.[1] He might, though he lived apart from his wife, recover of a third person her earnings deposited in a Savings Bank, which she had transferred to such third person for a valuable consideration. *McKelvin* v. *Bresslin*, 8 Gray, 177. In all this there was an option to be exercised by the husband during his lifetime; but the Revised Statutes added new rigor to the common law, by compelling the husband, (through the trustee process,) to reduce to his own possession his wife's choses in action, for the benefit of his creditors. Thus her legacy and her distributive share were reached by the trustee process, in the hands of executors and administrators, to pay her husband's debts; provided he lived until the decree of distribution and the judgment were obtained. Rev. St. ch. 109, § 62; *Holbrook* v. *Waters*, 19 Pick. 354; *Wheeler* v. *Bowen*, 20 ibid. 563; *Strong* v. *Smith*, 1 Met. 476.

In a case of peculiar hardship, the wife's earnings deposited in a Savings Bank, were held liable to the trustee process for her husband's debts, though she had lived apart from him for several years, and was in process of obtaining a divorce from bed and board for his acts of cruelty. *Ames* v. *Chew*, 5 Met. 320.

So sacred was this right of creditors, that it was held that the wife's future earnings could not be secured by ante-nuptial settlement to her, against their claims, whether prior or subsequent. *Keith* v. *Wombell*, 8 Pick. 215. The same rigor attended the insolvent law of 1838, ch. 163; where the assignee was bound to reduce to his possession the wife's choses in action; the wife, however, being allowed by bill or petition to have a suitable provision made for herself and children. *Davis* v. *Newton*, 6 Met. 537. So of the wife's interest, under the will of her father, whether in the personalty or realty, (under the Insolvent act of 1838,) with the same qualification, however, as to the support of the wife and children. *Gardner* v. *Hooper*, 3 Gray, 398.

The United States bankrupt act of 1841 was held to give the husband's assignee such property in the wife's promissory notes, that she, with her husband, could not indorse them, subsequent to his act of bankruptcy, without the consent of the assignee. *Smith* v. *Chandler*, 3 Gray, 397. Where no right of creditors has intervened, and the husband has assented clearly, the wife has been allowed so far to act as a *feme sole*, in regard to her own property, as to pass a good title by her sole indorsement, to a promissory note, made payable to her during coverture. *Stevens* v. *Beals*, 10 Cush. 292.

There were early certain qualifications to the husband's power of reducing to possession his wife's choses in action. It was held, in *Page* v. *Estis*, 19 Pick. 269, that a husband, a short time before his divorce, did not reduce to possession his wife's property in the hands of her guardian, by making an assignment of it to a creditor, for a valuable consideration, with notice; such assignment being in fraud of the divorce act of 1828, ch. 55. Guardians not being enumerated in the Revised Statutes, ch. 109, § 62, in connection with the trustee process, it was held in *Gassett* v. *Grout*, 4 Met. 486, that a husband might well assign to trustees, for the benefit of his wife, her distributive share of her father's estate, then in

[1] For a full discussion of the husband's interest in the wife's legacy, see 20 Law Reporter, 121, and *Albee* v. *Carpenter*, 12 Cush. 382.

the hands of her guardian; thereby exempting it from attachment for his own debts.

As against the *husband's heirs*, the claim of the wife to her choses in action, after her decease, has been favored; especially, where he has treated the property during his lifetime as her sole and separate property. In *Phelps* v. *Phelps*, 20 Pick. 556, the wife was allowed to hold the note of a third person given to her, with her husband's assent; it being for accumulations of interest on notes which were held by her before marriage. So where the husband bought shares in a bank in her name, received the dividends for her, and did not pledge such shares, while he pledged his own shares in the same bank; see *Ames* v. *Chew*, 5 Met. 320; *Fisk* v. *Cushman*, 6 Cush. 20. But in *Jackson* v. *Parks*, 10 Cush. 550, where the wife held her *husband's* note, given in exchange for her own property, she was held not entitled to recover from his estate. Following out the same tendency to favor the wife, where her claims come in competition with the heirs of her husband, it has been held in *Whitten* v. *Whitten*, 3 Cush. 197, that if a wife, with her husband's money, and with his assent, purchase land in her own name, it will be presumed, (nothing more being apparent,) that there is no *resulting trust* in favor of the husband, but that he intended it as an advancement to his wife. These lenient decisions, founded sometimes on the husband's assent, sometimes on his employing his wife as an agent, many of them in equity, tended to relax the common-law rule as to the wife's inability to hold personal property. Statutes were passed with the same view.

By statute 1842, ch. 91, the wife's wages, up to $20, were exempt from the trustee process for the husband's debts. St. 1846, ch. 209, allowed her wages to be paid to her; so, too, her deposits with savings banks and individuals; subject however to attachment for his debts. St. 1852, ch. 292, made her sole receipt sufficient for the income of her trust property.

At length st. 1855, ch. 304, § 1, and st. 1857, ch. 249, § 1, exempted the wife's sole and separate ante-nuptial property, real and personal, and all her post-nuptial property, real and personal, acquired by descent, devise, bequest, or gift, from any person but her husband, from his control or from liability for his debts. But the General Statutes, ch. 108, § 1, her earnings, and the consideration paid her for releasing dower, are made her separate property.

It has been held under st. 1857, ch. 249, that a promissory note, made payable to a married woman, is exempt from attachment under the trustee process, by subsequent creditors of the husband. *Chapman* v. *Williams*, 13 Gray, 416. In equity, the court generally look with care at the wife's interests, and are not disposed to favor the husband's claims to her property, if at all qustionable. Thus where a testator bequeathed an annuity to his widow, payable to her without deduction, to be applied to the support of herself and her children, it was held that this annuity could not be anticipated, so as to be employed by her for the payment of the debts of her second husband. *Perkins* v. *Hays*, 3 Gray, 405. Still, the rule is a flexible one, and where the husband, in equity, claimed his wife's legacy under a will, the court refused to compel him to make provision for her; the testator knowing his circumstances, not having required it in the will, and his wife requesting that it might not be done. *Sawyer* v. *Baldwin*, 20 Pick. 378.

Sole Trader and Feme Sole. The right of a married woman to sue and be sued, under Revised Statutes, ch. 77, as *feme sole*, was, to say the least, a very qualified right. In 1842, it was held that a husband absenting himself from 1816 to 1832, in another State, returning but once, and then for one

week, and doing nothing for his wife's support, was not such a deserter as to authorize her being sued as a *feme sole*, on a note given by her for necessaries. *Gregory* v. *Pierce*, 4 Met. 478. And at any time prior to st. 1855, ch. 304, a judgment against a married woman, living separate from her husband who was an inhabitant of the commonwealth, was void; though founded on a contract in regard to her own business. *Morse* v. *Toppan*, 3 Gray, 411.

Before the Revised Statutes a wife whose husband was an idiotic pauper, was not held to be a *feme sole*. *Shaw* v. *Thompson*, 16 Pick. 198.

If divorced, however, from bed and board for her husband's misconduct, she could both sue and be sued as a *feme sole*. *Dean* v. *Richmond*, 5 Pick, 461. *Pierce* v. *Burnham*, 4 Met. 304. The ability to sue and be sued and to act as sole trader, which was strictly confined to a small class of unfortunate women, under the R. S., is now extended by st. 1855, ch. 304, § 4, in connection with st. 1857, ch. 249, § 3, to every married woman in the Commonwealth, to any property then her sole and separate property; or which may thereafter come to her by descent, devise, bequest, or the gift of any person except her husband. Her husband, however, is not liable for her acts and contracts as to her separate property, or as a sole trader, under st. 1857, ch. 249, § 6; and he need not be made a party to her suits commenced before or after marriage. G. S. ch. 127, § 22. An approximation to this separate condition of married women had been made by st. 1845, ch. 208, § 1, which allowed of antenuptial agreements without the intervention of trustees, schedules of the property being attached, and the whole going on record. By § 3 of the same act, conveyances, devises, and bequests were allowed to be made to women already married, without the intervention of trustees, but to go on record. Section 8 allowed the supreme judicial court to appoint a trustee, on petition of a married woman to hold her separate property in trust for her. The statutes of 1855 and 1857 appear to dispense with the schedules and records of the st. 1845.

A partial construction of st. 1845, ch. 208, may be found in *Beach* v. *Manchester*, 2 Cush. 72.

Joint Suits.—Where husband and wife are both slandered, the husband must sue alone for the slander against himself, and the husband and wife must in another action join in suing for the slander against the wife. *Gazynski* v. *Colburn*, 11 Cush. 10. The uttering of slanderous words of and concerning the plaintiff's wife by the defendant's wife, no persons being present but the said wives, does not authorize a suit by the plaintiff and wife against the defendant and wife, however public the place of uttering the words. *Sheffil* v. *Van Deusen*, 13 Gray, 304. Where the husband and wife had jointly recovered in a suit against a town, for damages done her by reason of a defect in the highway, *held*, that the husband alone, in a subsequent suit, cannot recover of the town for loss of her services and expense of healing, in consequence of such injury. *Harwood* v. *Lowell*, 4 Cush. 313.

Where the wife has no interest in a close, she should not be joined in a suit with her husband against a trespasser. *Meader* v. *Stone*, 7 Met. 151. The wife may be indicted with him as a common seller, though in the absence of the husband, and not coerced by him, under the liquor act 1852, ch. 322, § 12. *Commonwealth* v. *Murphy*, 2 Gray, 510. And living apart from her husband, she may be indicted alone and punished for keeping a house of ill-fame. *Commonwealth* v. *Lewis*, 1 Met. 151.

Witnesses.—The general rule of law that husband and wife, while the relation exists, cannot testify for or against each other, remained in full

vigor until 1856. The decision in 1850, in *Dickerman* v. *Graves*, 6 Cush. 308, which allowed a wife, after her divorce *a vinculo*, to testify for her husband in a suit for *crim. con.* brought by him against a third party, was held no exception to the rule. But by st. 1856, ch. 188, parties in all civil actions were allowed to testify in their own favor, and to be called as witnesses by the opposite party. This was held to make the wife a competent witness in a joint action of tort, by husband and wife, for personal injuries to her. *Snell* v. *Westport*, 20 Law Rep. 414.

To make her competent for her husband she must be a party. *Barber* v. *Goddard*, 20 Law Rep. 408. By st. 1857, ch. 305, repealing st. 1856, parties are made witnesses in civil actions for and against each other, — and where the wife is a party, she may testify for and against her husband; but they may not testify as to private conversations with each other. By st. 1859, ch. 230, the wife may testify in all actions brought against her husband, wherein the cause of action grows out of any wrong or injury by the husband to her, or his neglect to furnish her with proper means of support: see also G. S., ch. 131, § 14. In no case, however, can either party testify where a divorce is sought on the ground of alleged criminal conduct. See *Little* v. *Little*, 13 Gray, 264. The provision as to the death of parties in st. 1857 has been held not to apply to the case of one of several partners dying, who were all parties. *Hayward* v. *French*, 22 Law Rep. 657.

Divorce.—The indefinite power of divorce from bed and board under R. S. ch. 76, § 6, for *utter* desertion, was made, by st. 1838, ch. 126, a divorce from the bonds of matrimony on a continuous desertion of either party for the term of five years. In the case of *Pidge* v. *Pidge*, 3 Met. 257, it was held, (Putnam, Justice, dissenting,) that where the husband by his ill treatment, caused the wife to leave him for five years, she might obtain a divorce from bed and board under R. St. ch. 76, § 6, but not *a vinculo* under st. 1838, ch. 126; though he utterly neglected to provide for her, and did not seek to live with her. Under st. 1838, the court were held to have no jurisdiction over parties marrying and residing in New Hampshire, and the husband deserting his wife there; though the wife for five years after such desertion had resided in Massachusetts, and the husband and wife had been residents here prior to their marriage. *Brett* v. *Brett*. 5 Met. 233. By st. 1843, ch. 77, however, if the causes for divorce are sufficient, and the applicant has resided in Massachusetts for five years, the divorce may be granted, though the cause occurred elsewhere. By st. 1841, ch. 83, the guilty party, in a divorce *a vinculo*, was prohibited from marrying in the lifetime of the other,— see *Commonwealth* v. *Hunt*, 4 Cush. 50,—and the wife, if innocent, by st. 1849, ch. 141, was authorized to resume her maiden name; or, (G. S. ch. 107, § 23) the name of any former husband. By st. 1850, ch. 100, if the husband or wife joined a religious society, professing to believe the conjugal relation void or unlawful, and refused to cohabit, the party so deserted might, at the end of three years, obtain a divorce *a vinculo*. And the husband, by st. 1851, ch. 82, (extended by st. 1855, ch. 65 and ch. 137,) may be required to furnish his wife the means to procure a divorce or defend herself.

The year 1855 abounded in legislation for persons unhappily married. By ch. 27, of the acts of that year, where the parties lived here at the time of solemnizing the marriage, and also at the time of filing the bill, the court have jurisdiction, though the marriage was celebrated in another State. By ch. 56, either party, in a trial for divorce, might have a jury, a new trial, and might file exceptions, etc. Ch. 137 provided for the attach-

ment of the husband's property on filing a libel for divorce *a vinculo*, or from bed and board; also for alimony and counsel fees *pendente lite;* and provision is made that a temporary return shall not affect a libel for desertion. See *Hews* v. *Hews*, 7 Gray, 279. By ch. 426, a party living in Massachusetts, if divorced here *a vinculo*, or in another State, not for adultery, may, on petition, be allowed to marry again.

By st. 1855, ch. 137, and St. 1856, ch. 24, the court may award the custody of children *pendente lite*, and after a divorce, and also where parents live separately, on the principle that the rights of the parents to their children, in the absence of misconduct, are equal, and the happiness and welfare of the children are to determine the care and custody.

The st. of 1857, ch. 228, taking a retrospective and prospective view of the subject, provides that if parties divorced from bed and board under R. S. ch. 76, § 6, have lived apart *five years*, the *innocent* party may have a divorce *a vinculo;* if *ten years*, then either party may have a divorce *a vinculo*. The deserting party filing a libel for divorce *a vinculo*, must show cruelty and neglect; and alimony may be decreed against the wife's estate. By st. 1858, ch. 47, all decrees for alimony and allowance *pendente lite* and final are to be enforced as decrees in equity. These various provisions have been little discussed in the printed reports. The st. 1851, ch. 82, was held not to authorize the counsel who defended a wife successfully in a libel for divorce, to recover of her husband counsel fees. *Aliter* of taxable costs and necessary expenses. *Coffin* v. *Dunham*, 8 Cush. 404; S. P. 1 Met. 279. But under St. 1855, ch. 137, § 6, counsel fees are allowed. *Baldwin* v. *Baldwin*, 6 Gray, 341. And the wife, under st. 1838, ch. 126, was held entitled to her costs as against her husband, when he discontinued voluntarily his former libel for divorce under R. S. ch. 76, § 6. And his libel under R. S. ch. 76, § 6, from bed and board cannot be pleaded by her in abatement of his subsequent libel *a vinculo* under st. 1838, ch. 126. *Stevens* v. *Stevens*, 1 Met. 279.

In regard to desertion, it has been held that a husband being committed to the house of correction, on several successive sentences, at short intervals, will not prevent his wife's obtaining a divorce, if the desertion commenced before the first commitment, and continued during the intervals. *Hews* v. *Hews*, 7 Gray, 279.

In *Gardner* v. *Gardner*, 2 Gray, 434, it is held that cruelty as well as adultery may be condoned; but that a single instance of cohabitation preceded and followed by those acts of cruelty for which she brings her libel, is no condonation on the part of the wife.

In regard to *alimony*, the husband's conveyance, after having committed adultery, with a view to prevent his wife from securing her alimony, was set aside, though the libel was filed after such conveyance. *Livermore* v. *Boutelle*, 21 Law Rep. 563. Prior to st. 1855, ch. 137, § 6, the wife *pendente lite* was not entitled to alimony; but only after a decree of divorce. *Shannon* v. *Shannon*, 2 Gray, 285. As to waiver of alimony by the wife's contracts and conduct, see *Albee* v. *Wyman*, 20 Law Rep. 581.

The binding power of an *ante-nuptial settlement*, controlling apparently R. S. ch. 76, §§ 27, 28, is illustrated in *Babcock* v. *Smith*, 22 Pick. 61. The court there held that they had no power to reform a settlement which gave to the husband the income of the wife's property for his life, in case he survived her, notwithstanding the wife had been divorced for his adultery; without such settlement she would have been entitled to her property under the R. S.,—a severe application this of the doctrine as to marriage settlements before laid down in *Hildreth* v. *Elliot*, 8 Pick. 293.

In what light our courts regard *divorces granted in other States*, and how

far they will be supported, appears in *Lyon* v. *Lyon*, 2 Gray, 367, and in *Chase* v. *Chase*, 6 Gray, 157. In the latter case a husband living in Massachusetts, went to Maine and there obtained a divorce for a slight cause from his wife, living in Massachusetts; and it was held void by R. S. ch. 76, § 39, though the wife appeared and answered to the libel in Maine. The same principles were confirmed in *Smith* v. *Smith*, 13 Gray, 209, where the husband went to Indiana, and obtained a divorce *a vinculo* for the desertion of his wife for six months; the parties residing here, and the desertion occurring here. In this case matters in estoppel are discussed, and the common law of estoppel is held not to apply to cases of divorce, so as to prevent such husband from applying here for a divorce on the ground of the adultery of the wife. A decree regularly obtained is however final. Thus under R. S. ch. 99, §§ 1, 19, a decree dismissing a libel for divorce is held not to be a civil action for which a writ of review will lie, *Lucas* v. *Lucas*, 3 Gray, 136; and a decree of divorce fraudulently obtained, is so far final that the libellee cannot have it set aside by subsequent original proceedings, *Greene v. Greene*, 2 Gray, 361. But a decree fraudulently obtained may, nevertheless, be set aside by the innocent libellee, if application is made at the same term and before the decree is extended. *Carley* v. *Carley*, 7 Gray, 545.

The will of a married woman.—The wife's power recognized in 13 Pick. 423, to make an instrument in the nature of a will, secured to her by ante-nuptial agreement, without the husband's indorsement, is not taken away by st. 1842, ch. 74, which required the indorsement of the husband's consent on the will. *Heath* v. *Withington*, 6 Cush. 497. An ante-nuptial agreement securing to the wife her property, without, however, giving her the power to make a will, does not entitle her, under the st. 1842, ch. 74, nor under st. 1845, ch. 208, to make a will, without her husband's indorsement. *Tinker* v. *Beach*, 11 Met. 349; *Beach* v. *Manchester*, 2 Cush. 72.

Under st. 1842, the will must be indorsed during the wife's lifetime. *Smith* v. *Sweet*, 1 Cush. 470.

In *Morse* v. *Thompson*, 4 Cush. 562, it was held, (WILDE and DEWEY, JJ. dissenting,) that a wife could not devise under st. 1842, ch. 74, her real estate to her husband, though he indorsed his consent; because his interest in her real estate could not be affected favorably or unfavorably. The st. 1850, ch. 200, removed that doubt by allowing her to devise to him her real and personal property without his assent indorsed. In *Beal* v. *Warren*, 2 Gray, 447, the court in the case of a deed of a married woman's real estate under st. 1845, ch. 208, *held* that she might without her husband's joining, convey everything but his tenancy by the curtesy; qualifying thereby *Beach* v. *Manchester*, 2 Cush. 72; *Tinker* v. *Beach*, 11 Met. 349; if not *Morse* v. *Thompson*, 4 Cush. 562.

Where a married woman in New Hampshire devised her lands lying there and in Massachusetts, the will having been proved there and allowed to be filed and recorded here, under R. S. ch. 62, § 19, without appeal or reversal; it was *held*, that the heirs were estopped from afterwards denying here in a court of law, the capacity of the testatrix to devise her real estate. *Parker* v. *Parker*, 11 Cush. 519.

The following has been the course of legislation upon this subject. The first statute (1842, ch. 74) gave a married woman the power of making a will of her separate real and personal property, if twenty-one years of age. The husband's assent in writing was to be indorsed, and his rights and interests could in no wise be affected by such will; she might revok such will at her pleasure, and without his consent.

These limited powers were farther extended, and now by st. 1855, ch

304, § 5, in connection with st. 1857, ch. 249, § 4, any married woman may make a will, "devising or bequeathing" her "sole and separate" property; but such will shall not deprive her husband of his curtesy in her real estate, nor bequeath away from him more than one half her personal estate, without his consent in writing. See also G. S. ch. 108, §§ 9, 10.

Our examination thus far has touched upon the rights of married women mainly during the lifetime of the husband. The changes made since the Revised Statutes in their rights, after the husband's death, are quite numerous and important. The statutes and decisions are arranged under the heads of *The Widow's Allowance,—Her Election*, including her distributive share; *Her Dower*, including her share in his real estate; and *Homestead Exemption*. To avoid extending the examination, we omit for the present, what might properly be arranged under the general head of *Wills and Trusts* for the benefit of married women.

The Widow's Allowance.—A wife attending her sick husband abroad, not returning to his home after his death, was held not to be entitled to an allowance under Revised Statutes, ch. 60, § 16, for her sustenance during forty days, *Fisk* v. *Cushman*, 6 Cush. 28. The st. 1838, ch. 145, in relation to the allowance to widows for necessaries, repealing Revised Statutes, ch. 65, §§ 4, 5, 6, and ch. 68, § 26, is held not to apply to a widow having no children, living apart, for whatever cause, from her husband, by agreement, for several years, and having the control of her separate property, *Hollenbeck* v. *Pixley*, 3 Gray, 521. The widow's allowance under this statute is personal, not surviving to her administrator, like her distributive share; but it is lost by her death before her appeal from the probate decree is entered. *Adams* v. *Adams*, 10 Met. 170. Under statute 1838, a second allowance may be made to the widow, at any time before the husband's personal estate is exhausted; but if after the first allowance, the estate is exhausted by payment of debts and expenses, the widow's right to a second allowance, and to an appeal from the first allowance, is gone, though less than one year has elapsed since the appointment of the administrator. *Hale* v. *Hale*, 1 Gray, 518.

Under statute 1838, a widow accepting a provision under the will, in lieu of dower, is entitled to an allowance, though the executor is residuary legatee, and has given bonds to pay debts. *Williams* v. *Williams*, 5 Gray, 24.

By statute 1859, ch. 143, pending suits concerning the proof of wills, the special administrator, (Revised Statutes, ch. 64, § 6, and statute 1858, ch. 122,) may make an allowance for the support of the widow and children. Such allowance is made on petition by the widow or children to the judge of probate, after notice; and is limited to the amount to which they might be entitled if the will were not admitted to probate. As to the allowance to children where there is no widow, see st. 1842, ch. 15, and on the whole subject, G. S. ch. 96, §§ 4, 5.

Her Election.—It was held under R. S. ch. 60, § 6, that a widow remaining in her husband's house, with the assent of his heirs, made thereby no election of alternative provisions under his will. *Phelps* v. *Peck*, 20 Pick. 556.

For an instance of the widow and heirs living together twenty years without election or estoppel, see *Fitts* v. *Cook*, 5 Cush. 596. A provision allowing her "the sum of $5000, out of such property as she chooses," does not allow a widow to elect real estate. *Fisk* v. *Cushman*, 6 Cush. 20. For a provision in lieu of dower, and an acceptance under a will, see *Adams* v. *Adams*, 5 Met. 277. For a sufficient jointure before marriage, in personal property, and an acceptance of it by the widow, barring her

claim of dower, under R. S. ch. 60, §§ 8, 9, see *Vincent* v. *Vincent*, 2 Cush. 467.

Under st. 1783, ch. 24, § 8, which limited no time for the widow's claim, it was held that her claim, made thirteen years after her husband's death, for dower in lieu of the provisions of his will was barred by her sales, and other acts done under the will. *Delay* v. *Vinal*, 1 Met. 57. Under R. S. ch. 60, §§ 11, 13, limiting the time for making the claim, a widow might, after the six months have expired, claim dower in lieu of the provisions of the will, if such provisions were required to pay her husband's debts. *Thompson* v. *McGaw*, 1 Met. 66. Where a will does not expressly give to the widow both dower and the provisions under the will, *held*, that by her acts in not claiming dower, but leasing the estate devised to her by the will, she had made her election of the provisions of her husband's will under R. S. ch. 60, § 115. *Pratt* v. *Felton*, 4 Cush. 176.

The statute 1854, ch. 406, has made changes in the widow's distributive share in her husband's personal estate, when he dies without issue; giving all the residue of it to her in case it do not exceed $5,000, &c. after payment of debts. *Brigham* v. *Maynard*, 20 Law Rep. 410. By § 5 of said act in connection with st. 1854, ch. 428, any widow may, within six months after probate, waive the provisions of her husband's will, and take the share of his real and personal property that she would have been entitled to if he had died intestate; provided she does not receive more than $10,000 out of the personal estate. The election under this statute, 1854, ch. 428, has been held a personal right of the widow, which could not be exercised by her heirs, in case she died within the six months. *Sherman* v. *Newton*, 6 Gray, 307.

Dower.—There has been little discussion as to the kind of land in which the widow may claim dower. R. S. ch. 60, § 12.

In *Shattuck* v. *Gragg*, 23 Pick. 88, she was held dowable of a tract one mile from her husband's dwelling, formerly a pasture, but then wood land. Under R. S. ch. 60, §§ 1, 2, 3, the judge of probate was held to have no authority to assign to her dower in lands mortgaged by her husband. Such dower, or its equivalent, is to be assigned the widow by conditional judgment, under R. S. ch. 107, § 24. *Raynham* v. *Wilmarth*, 13 Met. 415.

What will estop the widow's claim.—The widow is not estopped from claiming dower by the fact that her husband's administrator conveyed lands to a party who procured from her husband's grantor a quitclaim deed confirming her husband's title. *Hale* v. *Munn*, 4 Gray, 132. Nor is she estopped by having once joined her husband in releasing her dower, his conveyance having been set aside by his creditors, in his lifetime, on the ground that it was fraudulent as to them. *Robinson* v. *Bates*, 3 Met. 40. But she is estopped if the husband make the fraudulent conveyance before marriage; although such conveyance is set aside during coverture. *Whithed* v. *Mallory*, 4 Cush. 138.

What is the *seisin* of the husband during coverture, which entitles the widow to dower, has been decided in the following cases: A seisin, in law, has been held sufficient (*Atwood* v. *Atwood*, 22 Pick. 283). Where the husband, before marriage, leases land to A, for life, and dies before A, he has no seisin during coverture that entitles his widow to dower, though the lease to A for life is not recorded. *Blood* v. *Blood*, 23 Pick. 80.

Where A conveyed land to B, and B, after entry, reconveyed the same to A, and A conveyed the land to C, the deed of A to C being the only one put on record,—*Held*, that B's widow, though the conveyance was made to her husband during coverture, was not entitled to dower as against C, who knew nothing of the prior conveyances. *Emerson* v. *Harris*, 6 Met. 475.

Where land is conveyed to A by deed, and he executes thereupon an instrument in the nature of a mortgage to secure the maintenance of the grantor for life, *held*, that on the death of the grantor, during A's life, the widow of A is entitled to dower. *Lanfair* v. *Lanfair*, 18 Pick. 299. On the specific performance of a contract to convey, to one since deceased, his widow is entitled to dower under R. S. ch. 74, § 8. *Reed* v. *Whitney*, 7 Gray, 537. The construction to be given to the R. S., ch. 60, § 2, and ch. 107, §§ 10, 11, 12, in regard to the widow's dower in mortgaged premises and her right of redemption, has been much discussed. The principle adopted in *Gibson* v. *Crehore*, 5 Pick, 145, and the earlier cases, has been carried out since the Revised Statutes. In general, the principle is, that the widow is not barred unless she is expressly notified after the death of her husband, and three years before she brings her bill in equity to redeem, that the mortgagee has entered for the purpose of foreclosure; and she may redeem on paying the mortgage. In *Eaton* v. *Simonds*, 14 Pick. 98, decided before the R. S. she was allowed to claim dower in mortgaged premises, because the mortgage was extinguished and the equity of redemption was not foreclosed by notice to her after her husband's death, given three years prior to her bringing suit. Since the R. S. the wife is dowable of the equity of redemption only, in case the husband was seised of the equity only, and they have both neglected to reduce the mortgage or pay it off. *Newton* v. *Cook*, 4 Gray, 46; *S. P. Pynchon* v. *Lester*, 6 Gray, 314; G. S. ch. 90, § 2. In *Lund* v. *Woods*, 11 Met. 566, the widow is not held to be notified that the mortgagee entered during her husband's lifetime for foreclosure, by his taking possession of the land; but she is entitled to a personal notice, after her husband's death, and three years before suit brought by her, that he has so entered for foreclosure.

A widow, remaining in possession of premises mortgaged by herself and her late husband, has three years to redeem after possession is taken under a judgment against herself; and the filing of her bill to redeem is the commencement of her suit to redeem. In such case she is entitled to redeem on paying her proportion of the mortgage debt, without deducting the value of her husband's improvements put upon the land, under a prior recorded building contract (st. 1819, ch. 156); or the price paid by the assignee of the mortgagee to raise such prior building incumbrance. *Van Vronker* v. *Eastman*, 7 Met. 157.

A widow releasing her dower in the second only of three mortgages, is entitled to dower as against the third mortgagee, who, on payment of the debt, caused the first and third mortgages to be discharged of record, without taking an assignment of them; the court treating however a mortgage, whether discharged or assigned, as existing or not, according to the circumstances. *Wedge* v. *Moore*, 6 Cush. 8; *S. P. Niles* v. *Nye*, 13 Met. 135; *Gibson* v. *Crehore*, 5 Pick. 145. Where a husband dies in possession of the mortgaged premises, and the mortgage, to which his wife was a party, is still unpaid, the widow is entitled to have dower assigned to her in the whole premises, if the mortgagee does not object to such assignment, nor the heirs and devisees of the mortgagor. *Margaret Henry's case*, 4 Cush. 257. But where the debt is not paid, or the mortgagee objects, a widow who has joined in the mortgage, cannot have dower and redeem as against the mortgagee, unless she offer to pay all the mortgage debt. *McCabe* v. *Bellows*, 7 Gray, 148.

Thus far the courts have been applying to cases of dower statutes and decisions made prior to 1836. In adjusting the claims of the widow, and marshalling assets under the insolvent law of 1838, they have held that real estate bought with partnership funds, is subject first to partnership debts, and

next to the claim of the widow and heirs. *Burnside* v. *Merrick*, 4 Met. 537. The direct changes by statute in the law of dower are quite important. Under R. S. ch. 60, § 7, the deed of a married woman, executed in her lifetime, by her alone, does not release her dower. *Page* v. *Page*, 6 Cush. 196. It is otherwise now under G. S. ch. 90, § 8.

The widow's demand for dower under R. S. ch. 102, § 2, of the person seised to be followed up by her action, not sooner than one month after demand, nor later than one year after such demand, was held to allow of several demands made by the widow, and to require a personal demand and service, on all persons thus seised, and not to be satisfied by leaving an attested copy of the demand at each of their dwellings. *Burbank* v. *Day*, 12 Met. 557.

But the st. 1855, ch. 438, allows such demand in writing to be served on the tenant of the freehold, or left at his place of abode. The widow's claim for dower under the Revised Statutes, need not have been made in writing. *Page* v. *Page*, 6 Cush. 196, G. S. ch. 135, §§ 1, 2, 3.

This claim for dower (like her election) is a personal claim. If the widow dies after judgment for dower, and before it is set out, her administrator cannot recover, as of the last term, judgment for damages for detention. *Atkins* v. *Yeomans*, 6 Met. 438. See also G. S. ch. 135, § 4.

The widow's claim for dower has been farther regulated by statute. By st. 1858, ch. 56, G. S. ch. 90, § 6, suits for dower must be brought within twenty years from the husband's decease, or removal of disabilities, or five years after the passage of the act. It had been before held, that the widow, having no seisin of land on the death of her husband, a writ of dower could not be barred by the statute of limitations, R. S. ch. 119, § 1. *Parker* v. *Obear*, 7 Met. 24.

By st. 1857, ch. 229, in connection with st. 1854, ch. 377, the interest of a wife joining in a mortgage containing a power of sale, is barred by the sale. Under st. 1842, ch. 73, if the widow of a tenant in common claims dower, the land is to be first partitioned; and by st. 1848, ch. 317, officers setting off dower under R. S. ch. 102, § 6, may administer an oath. By st. 1855, ch. 122, making pews personal property, existing rights of dower are saved; and there are provisions for releasing the wife's dower by guardian where she is insane, contained in st. 1856, ch. 169. G. S. ch. 108, § 20.

But these are minor provisions, compared with the st. 1854, ch. 406, in connection with st. 1858, ch. 33, by which the widow of an intestate husband, without children, takes half his real estate for life, with a right to use and clear the wild land as her husband might; which is to be assigned to her as dower may be assigned under R. S. ch. 60.

Such widow is still at liberty to renounce these provisions, and others concerning the personalty, and claim her proper dower; but so favorable are these new provisions deemed, that by § 4, she will be presumed to elect them, unless within six months of the date of letters of administration, she files her election of her proper dower, in the Probate Office. G. S. ch. 90, §§ 15, 16, 17.

In case there are *no kindred* she takes *all* her husband's lands. G. S. ch. 91, § 1, cl. 8.

All classes of widows have shared in the favorable legislation of the last ten years. The hard law of alienage and escheat, as laid down in *Slater* v. *Nason*, 15 Pick. 345, has been abated by st. 1849, ch. 87, allowing widows to inherit as heirs at law when lands would otherwise escheat. By st. 1852, chs. 29, 86, the whole law of escheat on account of alienage is virtually abolished. See G. S. ch. 91, § 1, cl. 9.

Homestead Exemption.—The course of legislation, as we have examined it thus far, has tended to take from the husband many of his ancient prerogatives; reducing him from the Baron of the common law, to a tenant at will, in his wife's personal as well as real estate; nothing absolutely remaining to him but his curtesy. To reinforce the modern husband, the legislature, by means of *homestead laws*, under the guise of exempting a portion of his real estate from levy on execution, have recently endeavored to give to the husband a species of masculine dower, independent of his wife and all his creditors. The homestead act 1851, ch. 340, required a record of the intention to be made. It was in force until repealed by statute 1855, ch. 238. This repealing act of 1855 saved, however, all rights acquired under statute 1851. The statute 1855, requiring no record of intention, was in turn repealed by the new homestead act 1857, ch. 298, saving, however, all rights acquired under statute 1855. This statute 1857 has been somewhat amended by the statute 1858, ch. 62; see also G. S. ch. 104. We give below all the decisions on these complicated statutes that we have been able to find. They may affect essentially the rights of married women; for the exemption continues under these homestead acts until the wife chooses to release it; and it may last during the lifetime of the widow, as well as of the children, or, as amended by st. 1857, ch. 298, § 2, until the widow marries again.

Under st. 1851, allowing an estate of $500 to be exempt, it was held that the mortgage of the entire estate, exceeding in value $500, in which the wife did not join, conveyed to the grantee no title; provided the mortgagor had secured by record the estate, or any part of it, as a homestead. *Richards* v. *Chase*, 2 Gray, 383.

Where the husband has been adjudged a spendthrift, and his guardian, under a license of the Probate Court, sells his land, the wife under st. 1855, need not join in a deed of the homestead. *Wilbur* v. *Hickey*, 20 Law Rep. 352. The husband alone, under st. 1855, ch. 238, cannot convey by quitclaim deed, where the wife owns the land, and the husband has an estate for their joint lives; though both have left the house, and moved the furniture, the wife taking care of the deserted house. *Drury* v. *Batchelder*, 21 Law Rep. 561.

To show how extensive may be the application of these acts it has been held that all householders in Massachusetts, between May 27, 1855 and June 30, 1857, (the period during which the st. 1855, ch. 238 remained in force,) acquired rights of homestead, without making any record whatever; and such rights, acquired under st. 1855, are held to be saved under st. 1857, ch. 298, § 3, without any record. The householder, under st. 1855, becoming insolvent, his debts, prior to the act, and prior to the purchase of the homestead, are to be deducted from $800, and the residue is to be set off to him as a homestead. *Clark* v. *Potter*, 13 Gray, 21; see, also, G. S. ch. 104, § 3. Under st. 1855, the mortgage of a homestead by husband and wife for debts contracted prior to the passage of the act, is void as against the husband's assignee in insolvency, if made with a view to give a preference to creditors under the insolvent act. *Beals* v. *Clark*, 13 Gray, 19.

With this brief view of the Homestead Act, we close our protracted, and yet not complete, examination of statutes and decisions, relating to married women. Many more decisions will be required to adjust the new and complicated provisions of the last ten years to the existing policy and laws of the Commonwealth, requiring the care and skill of learned judges for a long time to come. E. B.

Boston, May, 1860.

MISCELLANEOUS INTELLIGENCE.

RETIREMENT OF CHIEF JUSTICE SHAW.

PROCEEDINGS IN SUFFOLK COUNTY.

A very full meeting of the bar was held Monday, September 12, at noon, in the Supreme Judicial Court Room, for the purpose of giving expression to the sentiments of the profession upon the retirement of Hon. Lemuel Shaw from the Chief Justiceship of the Supreme Judicial Court of the Commonwealth. The meeting was called to order by Sydney Bartlett, Esq. Elias Merwin, Esq., was chosen Secretary, and Charles G. Loring, Esq., was elected Chairman.

On taking the chair, Mr. Loring said the occasion of the meeting was one of mingled sadness and congratulation. Its object was to take some action in regard to the resignation of our great Chief, who has performed his duty so long and so well. It did not become him to enter into a labored eulogy of the eminent jurist, whose words of learning and wisdom never served any temporary purpose, but had become foundation stones of juridical science. But as one of the elder members of the profession, he might be permitted to express his profound respect for the eminent jurist, and his affection for the man. It was indeed a matter of regret that they could no longer lean upon his wisdom and his learning; yet they might congratulate each other and the Commonwealth that the course of justice had been so directed so long. They might well congratulate him, too, upon the glorious work he has done for himself and for his fellow-men, and upon the immortality which his labors had secured to him. The chairman concluded by reading a letter from Hon. George Marston, of Barnstable, regretting that, as a member of the bar of the State, he could not be present at the meeting, and participate in its proceedings.

Sydney Bartlett, Esq., said that the object of the meeting was to appropriately notice the retirement of the Chief Justice, whose pure career for thirty years upon the bench had reflected itself upon the jurisprudence of the Commonwealth. He thought the fitting course to be pursued had been determined by that adopted in the case of Lord Mansfield. The usual course was to adopt resolutions which were entered upon the records of the court; but upon the present occasion, considering the personal relations they have so long sustained towards the Chief Justice, he deemed it more appropriate that this should be done by an address to be presented to the retiring Chief. He accordingly moved the appointment of a committee to draft an address.

Hon. John H. Clifford, in seconding the motion, said that he rose to give expression to feelings which came spontaneously from his heart; and he trusted that the bar, in addressing their venerated Chief, would avoid either the extreme of regret that he would no longer hold the high position he has for so many years filled, nor of condolence at the loss of the bar and the public in being deprived of his services. When I remember that he took his oath of office as chief justice on the same day that I took my own as an humble attorney-at-law; when I remember the good counsel that has come from a life so noble,—I look upon him not only as the keystone, but as the entire arch of the edifice. When I think of the valued legacy upon our shelves left by him to us and our descendants, it seems

more fitting that our sentiments should be of congratulation, and we should welcome him to that retirement to which he has so well earned a right.

The motion was adopted, and Messrs. Sydney Bartlett, B. F. Thomas, J. H. Clifford, J. G. Abbott, George T. Curtis, and P. W. Chandler, were appointed the committee.

Hon. B. F. Hallett remarked that, upon the retirement of Chief Justice Wilde, he had moved that a statue of Judge Wilde be placed somewhere within the court room. The result was before the meeting. There was now one unoccupied niche which it seemed to him spoke to this meeting. He moved that the committee already appointed be instructed to procure a bust of Judge Shaw, to be placed in the vacant niche.

Judge Warren moved that the motion be laid upon the table until the committee should report, and the motion was agreed to.

The committee, after about an hour's absence, reported an address. It is understood that the address was prepared by Geo. T. Curtis, Esq., and that it received the entire approval of the committee.

Charles M. Ellis, Esq. moved that the address be presented to the Chief Justice by a deputation from each of the bars of the Commonwealth; the committee to be designated by the chair. Mr. Ellis said that he was glad of the opportunity to express, in behalf of the junior members of the bar, the respect and veneration they entertained for the late Chief Justice.

The committee to present the address was designated as follows:—

Suffolk, S. Bartlett, B. R. Curtis, B. F. Hallett; Essex, Attorney-General Phillips; Middlesex, Benjamin F. Butler; Worcester, Levi Lincoln; Norfolk, J. J. Clarke; Hampshire, Osmyn Baker; Hampden, R. A. Chapman; Franklin, G. T. Davis; Berkshire, Julius Rockwell; Bristol, J. H. Clifford; Plymouth, William Baylies; Barnstable, Nymphas Marston.

Hon. B. F. Thomas moved that the author of the address, G. T. Curtis, Esq. be added to the committee. The motion was adopted.

Mr. Hallett called up his motion that the committee, which reported the address, be instructed to procure a bust of Judge Shaw to be placed in the Supreme Court room. The motion was unanimously adopted.

Hon. Benjamin R. Curtis moved that the chairman of the meeting be constituted a member of the committee to present the address. The motion prevailed by a unanimous vote.

Mr. Samuel Swett, who was introduced by the chairman as one of the veterans of the profession, then read the following statement:—

Lemuel Shaw, the son of Rev. Oakes Shaw, and Susannah, whose maiden name was Hayward, was born at Barnstable on the 9th of Jan., 1781. He entered Harvard University in 1796. Not so well fitted in the dead languages as many of his class, he was a superior scholar in the other branches. He was a member of the Phi Beta Kappa, and afterwards its President. The year after graduating, he became assistant teacher in one of the Boston public schools, and assistant editor, as corrector of the press, of the Boston Gazette. He studied law with David Everett, Esq., partly in Boston and partly in Amherst, N. H. He was admitted to the bar in New Hampshire in September, 1804, and two months afterwards in Massachusetts, when he commenced practice in Boston. At the bar he achieved the highest reputation; and as a referee, probably no other one in the city decided so many difficult and important cases.

He delivered an oration before the Boston Humane Society in 1811, and the Fourth of July oration in 1815. In 1811 he was chosen a Representative in the Legislature, and served in that office eight years, and was four years a member of the Senate. In 1820 he was in the convention for

revising the State Constitution. In the town of Boston he was a fire-warden, selectman, and member of the school committee. As one of the committee on the subject of a city government, he drew up a report of the form of such a government, that was accepted by the town; and he drafted the act of incorporation, that was passed by the legislature of 1822. He declined to be a representative in Congress, as he was invited to be by his friends, and in September, 1830, was made Chief Justice of the Supreme Judicial Court, which office he has held thirty years, and in which he has never been surpassed. With gigantic labor he has filled many large manuscript volumes with reports of cases. He was an Overseer of the College about fifteen years, and in the Corporation about thirty. In the Legislature he drew up an elaborate report concerning the lands of the United States, advocating the distribution of them, in part, to the old States for purposes of education, as well as to the new States in which they lie. He was blessed with a remarkably large, powerful, and vigorous frame, which alone could have sustained the pressure of the unremitted and vast exertions of his powerful intellect for eighty years. Unmarried till his thirty-eighth year, his mental acquisitions, uninterrupted by domestic cares, were immense, not only on professional subjects, but on nearly all branches of information,—politics, literature, and especially mechanics, to which the patent laws, probably, attracted his attention.

His ample, warm, and resolute heart is quite as remarkable as his understanding. A more social, generous, and hospitable man never lived; and his fund of mirthful and racy anecdote is perfectly inexhaustible. Most intimate with him for sixty-four years, we can vouch that his honor, integrity, and Christian faith were never for a moment questionable or questioned.

The meeting then adjourned.

On the 19th of September, the Committee of the Bar met at the law library and signed the address. They then proceeded to the residence of the Chief Justice, were received by him, and the Chairman of the Committee, Hon. Levi Lincoln, who, as Governor of the Commonwealth in 1830, appointed Mr. Shaw Chief Justice, addressed him as follows: —

"Sir: At a very full meeting of the Bar of the Commonwealth, held a few days since in this city, the gentlemen who accompany me were appointed a committee, to prepare and present to you an address, expressing the feelings of the Bar on the deeply interesting occasion of your retirement from the Bench. As the organ of the Committee, and at their request, I have now the honor of placing in your hands the Address adopted by the Bar."

Governor Lincoln then handed to the Ex-Chief Justice the following

ADDRESS.

To the Hon. Lemuel Shaw, late Chief Justice of the Commonwealth of Massachusetts.

SUPREME COURT ROOM, *Boston, Sept.* 10, 1860.

Sir: At the age of nearly eighty years you have recently closed a judicial career of unexampled honor and of almost unequalled duration, while yet in the full enjoyment of health and in the undiminished vigor of your intellectual powers.

This rare felicity, accorded to few of the distinguished magistrates who have left a lasting impression upon the jurisprudence of their times, has been vouchsafed by a kind Providence to you. In your voluntary retirement you are permitted to feel at once the public regret and the public acquiescence; for all admit your well-earned title to repose, and all deplore the arrival of a period when your right to that repose has become

superior to the claims which have so long held you in the service of the State.

Freed from official cares, you may now survey the fruits of your labors; may estimate their influence upon this age and upon future ages; and may know the magnitude of a debt, which your contemporaries acknowledge, which posterity will admit, but which neither can pay.

Deputed by the Bar of the Commonwealth, we come to thank you in their name, and we venture to add, in the name of the people of Massachusetts, for your long and beneficent public services; for your wise, firm, and enlightened administration of justice; for your untiring devotion to the duties of your high station; for the commanding influences of your mind and character upon the great interests of the State; and for the distinction which you have conferred upon the tribunal over which you have presided.

Called in middle life to a seat which had been made conspicuous to the whole country by the great men who preceded you, you were summoned to administer the law at a period when society had already began with rapid strides to advance in new and untried paths.

It was the task of those who went before you, to show that the principles of the common and the commercial law were available to the wants of communities which were far more recent than the origin of those systems. It was for you to adopt those systems to still newer and greater exigencies; to extend them to the solution of questions, which it required a profound sagacity to foresee, and for which an intimate knowledge of the law often enabled you to provide, before they had even fully arisen for judgment.

Thus it has been, that in your hands the law has met the demands of a period of unexampled activity and enterprise; while over all its varied and conflicting interests you have held the strong conservative sway of a judge, who moulds the rule for the present and the future out of the principles and precedents of the past. Thus, too, it has been, that every tribunal in the country has felt the weight of your judgments; and jurists, at home and abroad, look to you as one of the great expositors of the law.

We beg you, sir, to believe that we appreciate and thankfully remember the high qualities which have always distinguished you as a Chief Justice. Integrity, on which the community leans with absolute confidence; learning and industry, equal to all occasions; the faculty of assisting the tribunal to speak the consenting voices of several minds, as if they were the conclusions of one; the power of maintaining amid the conflicts of the Bar the supremacy of the Bench; these are the essential means by which a Chief Justice secures the usefulness of a Court. For thirty years the people of Massachusetts have known that they had all these great qualities in you; and we are sure that you will find their gratitude, in some degree, commensurate with what you have done, and what you have been.

While we are obliged to part with the magistrate, it is a consolation that the friend remains to us. You will still be near us, will be among us. Still your counsels will be open to us, and on your wisdom and your ready sympathy with all that concerns the progress and the welfare of society, we feel that we can rely. For the residue of your days we invoke the blessings of that power, whose rewards are for the faithful and the just.

"All that should accompany old age"

is yours; and that you may experience the happiness with which such

a life should close, is the earnest wish with which we subscribe ourselves,

Your affectionate friends and servants,

S. Bartlett, Charles G. Loring, B. R. Curtis, B. F. Hallett, George T. Curtis, *Suffolk;* Benjamin F. Butler, *Middlesex;* Stephen H. Phillips, *Essex;* Levi Lincoln, *Worcester;* John J. Clarke, *Norfolk;* Osmyn Baker, *Hampshire;* R. A. Chapman, *Hampden;* Geo. T. Davis, *Franklin;* Julius Rockwell, *Berkshire;* John H. Clifford, *Bristol;* William Baylies, *Plymouth;* Nymphas Marston, *Barnstable.*

Judge Shaw then read to the Committee, with evident emotion, but with his usual clear and strong enunciation, the subjoined

REPLY.

Gentlemen of the Bar of Massachusetts:

Your presence on this occassion, at the close of a judicial life, now somewhat extended, and the very kind and warm-hearted expressions in which you have felt justified in communicating your approbation of my judicial course, offered in this hour of parting, are most welcome and acceptable. It affords me an opportunity which I have long desired and now readily seize, to express to the government and people of the Commonwealth, and more especially to the entire Bar of Massachusetts, my hearty thanks for the kind and marked respect with which they have uniformly honored and cheered me personally from the first moment of my appointment to the present time; and more especially for the confiding and indulgent,—I might almost say the forbearing spirit, in which my professional brethren have regarded all my efforts towards the performance of the great duties with which I have been entrusted.

Be assured, my friends, this is no new or sudden feeling awakened by strong expressions of regard incident to the close of a career of judicial administration; it has rather resulted from my recollection of constant intercourse which has actually existed between judge and advocate, in trials, sometimes involving the most interesting and exciting topics, and leading to earnest and animated debate. If, upon such or any similar occasion, a momentary spark of resentment was excited at any supposed wrong, I am happy to believe that the feeling was but momentary, yielded to any reasonable explanation and was forthwith forgotten. This abiding reliance upon the good will of my professional associates, the advocates at the Bar, to do justice to my motives and to think favorably of my judicial acts was early and deeply impressed upon me; impressed indeed with so much force and effect, as to become a practical ground of relief and comfort in the performance of responsible duties, the weight of which would have otherwise been almost too oppressive to be borne.

But now, that my judicial labors are finished, and the responsibilities attending them have terminated, nothing could be more consolatory to my feelings, than the deliberate approval of my judicial course, by those most conversant with the contests and struggles of the forum,—most concerned in maintaining the justice and efficiency, as well as the honor and dignity, of our jurisprudence,—most capable of forming a true estimate of judicial character.

Gentlemen, in this slight retrospect of my judicial course, indeed in reviewing the whole course of my life, I desire in this solemn hour, to express my sincere and devout gratitude to that benignant and overruling Providence, who has crowned my days with innumerable blessings, without whose sustaining aid, all human strength is but weakness, and the highest human exertions but vanity. May the smiles of that Divine

Providence ever rest on the administration of justice, and on all the great civil and social interests of our beloved Commonwealth, to invigorate the minds, to warm the hearts, and to enlighten the consciences of all those engaged in their administration.

Gentlemen of the Committee, my brethren, associates, and friends, as I recognize in you the representatives of the Bar of Massachusetts, and in meeting you for the last time, I feel that it is no meeting of strangers. In regard to most of the members of our profession, indeed all of them who approach my own position in point of age, I have been associated with them not only in the labors of a common and honorable profession, in the interesting connection of judge and advocate in the actual administration of justice, but in the relations of friendship and social attachment. It is in a consciousness of this relation, and not, I hope you will believe me, in any feeling of arrogance, that I receive with grateful satisfaction, the very strong expressions of commendation, in which you sum up your estimate of my official course. I know the source whence it originates, and the feelings which clothe and accompany it, and the purpose it is intended to accomplish; and I have yet to learn that an approving judgment is less the true exponent of the mind that utters it, or less dear to one on whom it is bestowed, because conveyed in expressions tinged by the colors and warm with the glow of affectionate feeling. The termination of the interesting relations which have so long and uninterruptedly continued, seems a fit occasion for laying aside reserve, and speaking from the fulness and sincerity of the heart.

Gentlemen, pardon me in glancing a moment at the future, so far at least as to express a hope and prayer for the continued prosperity of institutions to which our lives have been dedicated. My hope rests on the enlightened character of the people of Massachusetts. I have already, from my own experience of the habitual respect of this community for the judiciary and its officers, spoken of the support and encouragement which it has afforded me under the weight of judicial responsibilities.

You will not, I am sure, ascribe to me the vanity of believing these favorable regards to proceed from any consideration personal to myself. No, gentlemen, I believe, and I rejoice in the conviction, that a noble veneration for the judiciary department of the government, and respect for those to whom it is entrusted is the pervading sentiment of the great body of the freemen of Massachusetts; that it nourishes and sustains an abiding conservative principle, favorable to the independence and stability of the judiciary, as the foundation of public peace, and the security of private rights. Much, very much was done by the wise founders of our Commonwealth to give force and effect to those principles and to maintain the just power of the judiciary, as among the essential elements of good government. If amidst the gusts and whirlwinds of political violence, of personal rancor and party rage, passion and force for the time bear rule, may we not still well hope that the calm reflection, the abiding reflection of the sober men of the Commonwealth will resume their sway, and enable a trustworthy Judiciary to maintain the safety of the State. Above all, let us be careful how we disparage the wisdom of our fathers, in providing for the appointment to judicial office, in fixing the tenure of office, and making judges "as free, impartial, and independent as the lot of humanity will admit." Let no plausible or delusive hope of obtaining a larger liberty, let not the example of any other State lead you in this matter to desert your own solid ground, until cautious reason or the well-tried experiment of others shall have demonstrated the establishment of a Judiciary wiser and more solid than our own.

Gentlemen, in terminating a long course of professional and judicial

life, and in taking leave of those with whom I have so long labored in the study and practice of the law, and in the administration of justice, I am happy to bear a strong testimony to my high sense of the influence and power of the legal profession, when honor, integrity, and a conscientious regard to duty, are its true characteristics. On you, gentlemen, and your associates and successors, as the professed ministers of the law, it depends to maintain this character. From your ranks, subject to your training, must be drawn all those who are called to the office of Judges; in truth, the value and efficiency of the Jurisprudence of Massachusetts is committed to your charge. And my last earnest hope and prayer for yourselves and successors, and for all the people of our beloved Commonwealth, is, that through an honorable practice of the law, and a faithful administration of justice, they may long continue to enjoy the inestimable blessings of liberty, safety, and peace.

Boston, 19th September, 1860. LEMUEL SHAW.

An account of the proceedings in Berkshire County, and notices of new books, are necessarily postponed until the next month.

The promotion of Mr. Justice Bigelow, to be Chief Justice of the Commonwealth, meets the general acceptance of the profession and the people, as one eminently fit to be made. Hon. Reuben A. Chapman, of Springfield, has been appointed to fill the vacancy caused by the above promotion.

NEW PUBLICATIONS RECEIVED.

GRAY'S REPORTS, Vol. 13. Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts, by Horace Gray, Jr. Vol. XIII. pp. 671. Boston: Little, Brown, & Co. 1860.

HEARD ON LIBEL AND SLANDER. A Treatise on the Law of Libel and Slander, by Franklin Fiske Heard. One vol. pp. 441. Lowell: Fisher A. Hildreth. 1860.

WASHBURN ON REAL PROPERTY. A Treatise on the American Law of Real Property. By Emory Washburn, LL. D., University Professor of Law in Harvard University. In two volumes. Vol. I. pp. 688. Boston: Little, Brown, & Co. 1860.

WHARTON'S LAW DICTIONARY. Law Lexicon, or Dictionary of Jurisprudence: explaining the technical Words and Phrases employed in the several Departments of English Law, including the various legal Terms used in commercial Transactions; together with an explanatory as well as literal Translation of the Latin maxims contained in the writings of the Ancient and Modern Commentators. By J. J. S. Wharton, Esq., M. A. Oxon, Barrister at Law, author of the "Articled Clerk's Manual," &c. Second American, from the second London edition, with additions by Edward Hopper. One vol. pp. 790. Philadelphia: Kay & Brother, Law Booksellers, Publishers, and Importers. 1860.

WHARTON AND STILLE'S MEDICAL JURISPRUDENCE. A treatise on Medical Jurisprudence, by Francis Wharton, author of "A Treatise on American Criminal Law," "Precedents and Indictments," "American Law of Homicide," &c., and Moreton Stillé, M. D., Lecturer on the principles and practice of medicine in the Philadelphia Association for Medical Instruction. The medical part revised and corrected, with numerous additions, by Alfred Stillé, M. D. Second and revised edition. One vol. pp. 1031. Philadelphia: Kay & Brother. 1860.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1860.	Returned by
Avery, Samuel P.	So. Reading,	August 31,	Wm. A. Richardson.
Ball, Lorenzo	Milford,	" 10,	Henry Chapin.
Ballard, Charles H.	Worcester,	" 15,	"
Bigelow, Charles	Natick,	" 20,	Wm. A. Richardson.
Bliss, Hiram	Sandisfield,	" 18,	James T. Robinson.
Boutwell, Wm. H.	Montague,	" 2,	Charles Mattoon.
Brick, Walter	Gardner,	" 6,	Henry Chapin.
Brown, Geo. W. (1)	Boston,	" 2,	Isaac Ames.
Brown, Reuben A. (2)	Chelsea,	" 7,	"
Bryant, Joseph S.	Malden,	" 22,	Wm. A. Richardson.
Butterworth Geo. H. } (3) " Alf. F. }	Dedham,	" 20,	George White.
Clapp, Samuel H.	Malden,	" 17,	Wm. A. Richardson.
Comee, Charles	Boston,	" 15,	Isaac Ames.
Conant, Galen, Jr. (4)	Middleboro',	" 23,	William H. Wood.
Cushing, John D.	Gt. Barrington,	" 20,	James T. Robinson.
Darracott, George	Boston,	" 14,	Isaac Ames.
Day, Benj. R. (5)	Winchendon,	" 7,	Henry Chapin.
Dean, Alexander	Worcester,	" 1,	"
Drake, Le Preleit (1)	Boston,	" 2,	Isaac Ames.
Dutton, Stephen T.	Northboro',	" 14,	Henry Chapin.
Frazer, John B.	Cambridge,	" 18,	Wm. A. Richardson.
Glover, Alfred R.	West Roxbury,	" 8,	George White.
Hawes, Edward W. W.	Somerville,	" 10,	Wm. A. Richardson.
Jennings, Joseph H.	Cambridge,	" 7,	"
Johnson, John S. (2)	Chelsea,	" 7,	Isaac Ames.
Kent, Henry A.	Boston,	" 7,	"
Lazell, Elbridge B. } (6) " Wm. H. }	Boston,	" 24,	"
Leonard, Henry D. (4)	Middleboro',	" 23,	William A. Wood.
Le Roy, Fernando C.	Adams,	July 3,	James T. Robinson.
Lord, Brackett	Newton,	August 7,	Wm. A. Richardson.
Mason, James W.	Cambridge,	" 24,	"
McKay, John	South Reading,	" 21,	"
Mills, Wm. (7)	Needham,	" 8,	George White.
Mulliken, Edward	Cambridge,	" 18,	Wm. A. Richardson.
Nelson, John S.	Petersham,	" 8,	Henry Chapin.
Newcomb, Oliver T. } (8) " Thad. H. }	Quincy,	" 8,	Geo. White.
Newton, J. H.	Webster,	" 10,	Henry Chapin.
Parks, Edwin (5)	Winchendon,	" 7,	"
Pettingill, Merrill	Boston,	" 2,	Isaac Ames.
Scanlan, Michael	Boston,	" 21,	"
Smith, Dwight	Chelsea,	" 6,	"
" Rachel M.	Eastham,	" 4,	J. M. Day.
Thomas, Henry	Weymouth,	" 13,	George White,
Tuttle, Jones	Boston,	" 14,	Isaac Ames.
Wales, Nathaniel Jr. (7)	Needham,	" 8,	George White.
Wallace, David	Clinton,	" 7,	Henry Chapin.
Webster, Everett	Cambridge,	" 22,	Wm. A. Richardson.
Wingate, Stephen B.	Chelsea,	" 22,	Isaac Ames.

FIRMS, &C.

(1) Drake & Brown.
(2) Brown & Johnson.
(3) G. H. & A. F. Butterworth.
(4) Conant & Leonard.
(5) Parks & Day.
(6) E. B. Lazell & Co.
(7) Wales & Mills.
(8) O. T. Newcomb & Co.